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vol. 2471
No. 11631

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL MOTOR BEARING CO., INC., a
Corporation,
Appellant,
vs.

CHANSLOR & LYON CO., a Corporation,
Appellee.

Transcript of Record
In Three Volumes
Volume I
Pages 1 to 240

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

No. 11631

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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San Francisco, California.
Attorney for Appellee.

On appeal from the United States District Court
for the Northern District of California, South-
ern Division.

Decision of Judge Louis E. Goodman.

[Endorsed]: Filed May 15, 1947.

In the United States District Court for the Northern
District of California, Southern Division

Civil Action No. 23697-G

Suit for Infringement of Letters

Patent No. 2,146,677

NATIONAL MOTOR BEARING CO., INC., a
corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a corporation,

Defendant.

BILL OF COMPLAINT

Now comes plaintiff and for its Bill of Complaint alleges:

I. Plaintiff

That the plaintiff, National Motor Bearing Co., Inc., is a corporation organized under and existing by virtue of the laws of the State of California, with its principal place of business in the City of Redwood City, County of San Mateo, State of California.

II. Defendant

That the defendant, Chanslor & Lyon Co., is a corporation duly organized and existing under the laws of the State of California with a principal place of business in the City and [1*] County of

• Page numbering appearing at foot of page of original certified Transcript of Record.

San Francisco, State of California, and said defendant is a resident and inhabitant of the Northern District of California, Southern Division.

III. Jurisdiction

1. That the jurisdiction of this Court is based upon the patent laws of the United States of America.

2. That the infringing acts of which complaint is made thereafter were and now are being committed by said defendant in San Francisco, California, in the Northern District of California, Southern Division, and elsewhere in the United States.

IV. Patent In Suit

1. That on August 5, 1936, Lloyd A. Johnson, being, within the meaning of the United States Statutes then in force, the original, first and sole inventor of a certain "Fluid Seal" and being entitled to a patent therein, under the provisions of the said Statutes, duly filed in the United States Patent Office an application for Letters Patent Serial No. 94,326, which application was duly executed on July 29, 1936.

2. That on February 7, 1939, all of the requirements of the then existing Statutes of the United States and Rules of Practice of the United States Patent Office having been complied with, Letters Patent of the United States No. 2,146,677, were duly granted on said application, which Letters Patent or a certified copy thereof plaintiff will pro-

duce at the trial, or earlier if this Court shall so direct.

V. Title to Patent

1. That on July 12, 1938, said Lloyd A. Johnson executed an assignment of all his right, title and interest in and to said application to National Oil Seal Co., a Nevada corporation, which said assignment was recorded in the United States Patent Office [2] on January 12, 1939, in Liber U-177, at page 620.

2. That pursuant to said assignment said Letters Patent No. 2,146,677 was issued to said National Oil Seal Co. on February 7, 1939, which company retained title thereto until it was assigned to plaintiff.

3. That on September 30, 1940, the said National Oil Seal Co. assigned its entire right, title and interest in and to said United States Letters Patent No. 2,146,677, together with all right of recovery for past infringement, to plaintiff National Motor Bearing Co., Inc., which said assignment is now being recorded in the United States Patent Office and plaintiff begs leave to add the date, Liber and page when advised of the same.

4. That copies of the aforesaid assignments are ready to be produced as this Court may direct.

5. That by virtue of these assignments the entire right, title and interest in and to United States Letters Patent No. 2,146,677, together with all rights

for recovery for past infringement, now is vested in the said plaintiff.

VI. Infringement

That defendant has, within the last six years, and prior to the filing of this Bill of Complaint, and subsequent to the date of said Letters Patent, infringed the same and threatens to continue to so infringe by making, offering for sale, or selling or causing to be sold, and using or causing to be used within this District and elsewhere within the United States, Fluid Seals made by the Victor Manufacturing & Gasket Company in accordance with and embodying the invention disclosed in and claimed in plaintiff's said Letters Patent, wilfully and without the consent of the plaintiff. [3]

VII. Notice

That the plaintiff has given notice to defendant, but in spite of said notice defendant has infringed and is continuing to infringe, to the substantial and irreparable injury of the plaintiff.

VIII. Damage

That defendant has derived unlawful gains and profits from such infringements, which plaintiff would otherwise have received but for such infringements and has thereby been caused irreparable damage.

Wherefore, Plaintiff prays:

1. For an injunction restraining the defendant, its officers, agents, servants and employees from

directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any ~~gas-mixing~~ devices made in accordance with or embodying the invention of said United States Letters Patent No. 2,146,677, or from infringement upon or violating the said Letters Patent in any way whatsoever. [Corrected by stipulation 11-15-44—W. J. C. Deputy Clerk.]

2. For the costs and an accounting of profits and damages.

3. For such other and further relief as the Court may deem meet and just.

A. DONHAM OWEN,
Attorney for Plaintiff.

Dated: 9/18, 1944.

[Endorsed]: Filed Sept. 18, 1944. [4]

[Title of District Court and Cause.]

MOTION FOR FURTHER AND BETTER
PARTICULARS AND EXTENSION OF
TIME TO ANSWER.

Comes now, the defendant in the above entitled cause and moves the Court for an order requiring plaintiff to file a further and better statement of the nature of its claim and further and better particulars of certain matters stated in its "Bill of Complaint," as follows:

1. State when and where, if at all, this defendant has made fluid seals alleged to infringe the Johnson patent No. 2,146,677.

2. State when and where, if at all this defendant has used fluid seals alleged to infringe the Johnson patent No. 2,146,677.

3. If the answer to the foregoing questions, or either of them, is in the affirmative, produce samples of such fluid seals as have been made and/or used, or clear drawings or other illustrations and descriptions of them, together with any markings by which they may be clearly identified.

4. State when, where and how plaintiff has given notice to the defendant of its alleged infringement, and if given in writing produce and furnish defendant with a copy thereof.

5. Referring to paragraph VI of the "Bill of Complaint," state what date and where defendant is alleged to have commenced the infringement complained of, and furnish defendant with samples or clear drawings or other illustrations and description of the fluid seals, together with any marking by which they may be identified, which are alleged to have been sold by defendant in infringement of the said Johnson patent No. 2,146,677. [5]

In the event the propriety of this motion is questioned, defendant requests permission to present a brief and oral argument in support of it.

Defendant further moves that its time for answer be extended thirty days beyond the date of service upon it of plaintiff's bill of particulars.

Dated October 6th, 1944.

WALLACE R. LANE,
CARL F. GEPPERT,
Counsel for Defendant.

A. W. BOYKEN,
Solicitor for Defendant.

Receipt of a copy of the foregoing motion on this 6th day of October, 1944, is hereby acknowledged.

A. DONHAM OWEN,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1944. [6]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Now comes the plaintiff and files this its bill of particulars, without prejudice to their correction, enlargement or change, if error be found:

Particular No. 1

Upon information and belief, plaintiff states that defendant has had the fluid seals, charged to infringe, made by Victor Manufacturing and Gasket Company within the six-year period before the filing of the Bill of Complaint herein.

Particular No. 2

Upon information and belief, plaintiff states that defendant has itself used locally and has caused others to use [7] fluid seals charged to infringe, within the six-year period before the filing of the Bill of Complaint herein.

Particular No. 3

Attached hereto and marked "Plaintiff's Exhibit 1" are illustrations of devices typical of those charged to infringe.

Particular No. 4

Oral notice was given an officer of defendant in San Francisco before the suit was filed, and written notice was given this defendant in the Bill of Complaint.

Particular No. 5

Plaintiff is not advised as to when defendant commenced the infringement complained of; furthermore that is a matter better known to defendant. The balance of the information sought in Request No. 5 is set forth in Plaintiff's Exhibit No. 1 attached hereto.

Dated November 10, 1944, San Francisco, Calif.

A. DONHAM OWEN,
Counsel for Plaintiff.

A copy of this Bill of Particulars was served on Messrs. Boyken, Mohler and Beckley, Counsel

for defendant by mailing a copy to their offices in the Crocker Building, San Francisco.

A. DONHAM OWEN.

(Here follows Plaintiff's Exhibit No. 1.)

[Plaintiff's Exhibit No. 1 appears in Book of Exhibits.]

[Endorsed]: Filed Nov. 11, 1944. [8]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed between counsel for the parties that the following typographical errors in the Bill of Complaint may be corrected by the Clerk:

On page 4, in the first paragraph of the prayer, line 4, strike out the words "gas mixing"; and in line 6 of the same paragraph, correct the number of the patent to read 2,146,677.

Dated November 10, 1944, San Francisco, Calif.

A. DONHAM OWEN,

Counsel for Plaintiff.

A. W. BOYKEN,

Counsel for Defendant.

[Endorsed]: Filed Nov. 15, 1944. [9]

[Title of District Court and Cause.]

ANSWER

I.

Defendant has no knowledge as to the corporate organization or existence or place of business of plaintiff, and therefore demands proof of same.

II.

Defendant admits that it is a corporation organized and existing under the laws of the State of California with a principal place of business in the City and County of San Francisco, State of California, and is a resident and inhabitant of the Northern District of California, Southern Division.

III.

(1) Defendant admits that the jurisdiction of this court is based upon the patent laws of the United States of America.

(2) Defendant denies each and every of the allegations contained in paragraph 2 of section III of the Bill of Complaint [10] in manner and form as therein set forth.

IV.

(1) Defendant denies each and every of the allegations contained in paragraph I of section IV of the Bill of Complaint, and specifically denies that on August 5, 1936, Lloyd A. Johnson, being, within the meaning of the United States Statutes

then in force, the original, first and sole inventor of a certain "Fluid Seal" and being entitled to a patent thereon.

(2) Defendant denies each and every of the allegations contained in paragraph 2 of Section IV of the Bill of Complaint.

V.

Defendant, upon information and belief, denies the allegations of paragraph 1, 2, 3, 4 and 5 of section V of the Bill of Complaint concerning plaintiff's alleged title to or rights of recovery under the Johnson patent No. 2,146,677, and demands immediate production of any documents upon which plaintiff will rely for its alleged title.

VI.

Defendant denies each and every allegation contained in section VI of the Bill of Complaint, and specifically denies that defendant has within the last six years, and prior to the filing of the Bill of Complaint, and subsequently to the date of said Letters Patent, infringed said patent and threatens to continue to so infringe by making, offering for sale, or selling or causing to be sold, and using or causing to be used within this District or elsewhere within the United States, any Fluid Seals which infringe the said Johnson patent No. 2,146,677. Defendant denies that it has ever manufactured any Fluid Seals or made any devices of the kind described and claimed in the patent in suit, whether as infringement thereof or otherwise.

VII.

Defendant denies each and every allegation of section VII of the Bill of Complaint and specifically denies that plaintiff [11] gave defendant any notice of infringement of the Johnson patent asserted prior to the filing of the Bill of Complaint or that defendant has at any time infringed said Letters Patent No. 2,146,677 or has threatened so to do.

VIII.

Defendant denies each and every allegation contained in section VIII of the Bill of Complaint, and specifically denies that defendant has derived unlawful gains and profits from such alleged infringements, which plaintiff would otherwise have received but for such alleged infringements.

IX.

Defendant further answering charges and alleges that the said Letters Patent No. 2,146,677 issued February 7, 1939, on the application filed August 5, 1936 and the claim thereof, are void and of no force and effect in law because the alleged invention and improvement claimed to be therein described, disclosed and claimed, have been long prior to the alleged invention or discovery thereof by the Johnson, or more than two years prior to his alleged application for said patent, patented, described and fully disclosed to the public in various patents and printed publications in the United States and foreign countries; that the said Johnson

was not the original, first and true inventor or discoveror thereof, or of any material or substantial part of the Fluid Seal claimed to be patented in said patent, but that the same had been in public use and on sale in this country for more than two years prior to Johnson's application for said patent: and that each and every part thereof had been invented, discovered, used by or known to others in this country and elsewhere before the alleged invention, discovery or appropriation thereof by Johnson. Defendant further charges and alleges that in view of the prior art existing at the time, there was no invention in what said Johnson claims to have invented.

The following patents, names of parties mentioned in said patents and the owners thereof, with the addresses there given and elsewhere, printed publications, prior users, inventors, [12] discoverors and those having prior knowledge of the alleged invention, with their addresses which are also the places where the uses occurred and the knowledge and the discoveries had and the work done, are among those supporting these defenses, and to which defendant makes reference and gives notice, to wit:

1,040,308	Godley, October 8, 1912
1,740,929	Loock, December 24, 1929
1,905,800	Chandler, April 25, 1933
1,938,746	Fitzgerald, December 11, 1934
2,013,333	Anderson, September 3, 1935
2,052,762	Gits, September 1, 1936

2,071,403	Heinze, February 23, 1937
2,089,461	Winter, August 10, 1937
2,114,908	Peterson, April 19, 1938
2,116,240	Heinze, May 3, 1938
1,817,095	Penick et al, August 4, 1931
1,862,153	Lee, June 7, 1932
1,996,210	Lord et al, April 2, 1935
2,004,669	Miller, June 11, 1935

X.

Defendant, further answering, charges and alleges that said patent and the claim thereof are invalid and of no force and effect in law for the following reasons:

(a) Because they are totally lacking in patentable novelty and invention;

(b) Because they involved nothing more than ordinary mechanical and engineering skill and practice, not amounting to invention:

(c) Because the claim is vague, ambiguous, indefinite and inaccurate, and fails to point out and distinctly claim the part, improvement or combination claimed by Johnson as his invention or discovery.

XI.

Defendant further avers that continuously since long prior to the issuance of the Johnson Patent it has continuously and extensively sold Fluid Seals in San Francisco and adjacent areas where they have been in use during all that time, and that plaintiff and its predecessor in title to the Johnson

patent have been thoroughly familiar with such sale and use without asserting any charge of infringement of this patent until the [13] filing of this Bill of Complaint; wherefore, plaintiff is now barred from asserting any charge of infringement of said patent against the Fluid Seals here charged to infringe.

XII.

Defendant, upon information and belief, further alleges that the Fluid Seals of the patent in suit were never made, sold or used, to any substantial extent, if any, by the plaintiff or its predecessor in title.

XIII.

Defendant denies that plaintiff is entitled to any of the relief sought and prayed for in the Bill of Complaint; denies plaintiff's right to injunction, preliminary or perpetual, or any accounting for profits and damages, or that there has been any infringement; defendant further denies that plaintiff has any rights or is entitled to costs or any other and further relief; and prays that the Bill of Complaint be dismissed for want of equity at the cost of plaintiff.

Dated December 7, 1944.

WALLACE R. LANE

CARL T. GEPPERT

Counsel for Defendant

A. W. BOYKEN

Solicitor for Defendant

Receipt of a copy of the foregoing answer on this 7th day of December, 1944, is hereby acknowledged.

A. DONHAM OWEN

Counsel for Plaintiff

(Endorsed): Filed Dec. 8, 1944. [14]

District Court of the United States, Northern
District of California, Southern Division

No. 23697 G

NATIONAL MOTOR BEARING CO., INC.
a corporation

vs.

CHANSLOR & LYON CO., a corporation

NOTICE

To A. Donham Owen, Esq., 2110 Mills Tower,
San Francisco 4, California; and A. W. Boy-
ken, Esq., 723 Crocker Building, San Francisco
4, California.

You Are Hereby Notified that on January 8,
1945, the above-entitled case will appear on the Law
and Motion calendar of Judge Louis E. Goodman to
be set for Trial.

San Francisco, California

December 12, 1944.

C. W. CALBREATH

Clerk, U. S. District Court

[Title of District Court and Cause.]

AFFIDAVIT RE MOTION FOR SETTING

A. Donham Owen, being duly sworn, deposes and says that he is attorney for plaintiff in this case;

That the purpose of this affidavit is to show the reason for plaintiff's request that this case go off calendar;

That the original filing of this suit was held up by the war, because about ninety-five per cent (95%) of plaintiff's production has been for war use, and the time of plaintiff's engineers and officers to carry through this litigation could not be diverted from the war effort; [16]

That the plaintiff authorized filing this suit on September 18, 1944, when the statements coming out of Washington indicated there would be an end to the European war before the year was out and that there would then follow quickly a substantial re-conversion of war industries to civilian production;

That it was because of these statements that the suit was begun at that time;

That the slow-up in the European war and enlarged war orders have resulted in increased war manufacturing burdens for plaintiff and its engineers and officers, so that time cannot be taken presently to prepare and try this case; and

That as soon as the war orders in plaintiff's plant are cut down, as it was indicated by Wash-

ington officials last fall was to be expected, plaintiff then is most anxious to try this case.

A. DONHAM OWEN,
Attorney for Plaintiff.

Subscribed and sworn to before me this 5th day of January, 1946.

[Seal] /s/ ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco.

[Endorsed]: Filed Jan. 8, 1945. [17]

District Court of the United States, Northern
District of California, Southern Division

No. 23697 G

NATIONAL MOTOR BEARING CO.

vs.

CHANSLOR & LYON CO.

NOTICE

To A. Donald Owen, Esq., 2110 Mills Tower, San Francisco 4, California; and A. W. Boyken, Esq., 733 Crocker Building, San Francisco 4, California.

You are hereby notified that on November 7, 1945, Judge Louis E. Goodman ordered the above entitled case continued from December 11, 1945 to January 22, 1946 for trial.

C. W. CALBREATH,
Clerk, U. S. District Court.

San Francisco, November 7, 1945. [18]

[Title of District Court and Cause.]

NOTICE UNDER U. S. CODE TITLE 35, SEC. 69

To National Motor Bearing Co., Inc., a corporation,
Plaintiff, and A. Donham Owen, its attorney:

Please take notice that at the trial of this suit defendant, in addition to the United States Patents set forth in Paragraph IX of the Answer on file herein, intends to rely on the following United States Patents:

1,617,587 Frumveller, February 15, 1927.

2,000,341 Larsh, May 7, 1935.

2,094,160 Oldberg, September 28, 1937.

This notice is given pursuant to U. S. Code Title 34, Sec. 69, formerly R. S. Sec. 4920.

GEORGE I. HAIGHT,
CARL F. GEPPERT,
A. W. BOYKEN,
Counsel for Defendant.

San Francisco, California.

Dated: December 19, 1945.

Receipt of a copy of the foregoing Notice admitted this 19th day of December, 1945.

A. DONHAM OWEN,
Counsel for Plaintiff.

[Endorsed]: Filed Dec. 22, 1945. [19]

[Title of District Court and Cause.]

AFFIDAVIT RE MOTION TO TAKE PROOFS

A. Donham Owen, being duly sworn deposes and says: that he is counsel for plaintiff in the above case and tried the same before this court;

That exhibits 21 and 22 were introduced in evidence as samples of oil seals made and tested by plaintiff in August and September 1935 embodying the invention of the patent in suit;

That upon completion of the test of Exhibit 21 in 1935 it was put in the safe by the witness Johnson and remained there [20] over ten years until removed for the trial of this case in 1946;

That in September 1935 the seal marked Exhibit 22 was sent to affiant and had been in his possession continuously since that date until offered in evidence in 1946 in this case;

That he showed this seal, Exhibit 22 to the Primary Examiner and his assistant in the Patent Office in 1938, and in his presence they carefully examined the seal to see that it conformed substantially to the print Exhibit 23 and to the claim;

That it did so conform in September 1935 and 1938 to affiant's own knowledge;

That at the trial of this case in 1946 over ten years after the making of the seals Exhibits 21 and 22, counsel for defendant pointed out through the witness Johnson that the back of the molded resilient sealing member now projected a few thousandths of an inch beyond the radial plane of the cup bottom;

That to affiant's surprise and without any pleading to support it defendant's brief (pp. 6, 13, 29) attempts to invalidate the Johnson patent in suit on the argument that Exhibits 21 and 22 do not disclose the invention claimed and therefore since defendant's type A and H seals were made and sold prior to the filing date of the Johnson patent, they anticipate the Johnson patent;

That affiant was at a loss to understand how the seals Exhibits 21 and 22 were like the patent in suit when made in [21] September 1935 and in 1938 when shown to the two Patent Office officials, and now, over ten years later, the molded resilient sealing members had changed shape so that the outer radial face projected a few thousandths of an inch beyond the radial plane of the cup bottom;

That investigation since receiving a copy of defendant's brief has disclosed that the molded resilient sealing members on Exhibits 21 and 22 were made of Thiokol synthetic rubber and have changed shape in the intervening years;

That this is due to a phenomenon well known to workers in this art but not realized by affiant heretofore and apparently not realized by counsel for defendant;

That the change in shape which has caused the molded resilient sealing member on Exhibits 21 and 22 to move outwardly a few thousandths of an inch beyond the radial plane of the cup bottom is termed in text books as "cold flow";

That samples of these text book statements are:

“Thiokols have one other outstanding disadvantage which limits their applicability—a tendency to cold flow. Under conditions of instantaneous release they are as resilient as rubber, but when held for any length of time under pressure or load thiokols become distorted and consequently cannot be used in positions where they would encounter prolonged tension or compression.”

Page 133 of Fleck—Plastics—Scientific and Technological (1945). [22]

“Thioplasts and Cold Flow. As already indicated the great snag which has checked the progress of this class of synthetic rubbers is the cold flow. Under any degrees of temperature and pressure for any length of time these materials become distorted. Yet under conditions of instantaneous release they are quite as resilient as rubber. The cold flow is of considerable importance, since it means that the products cannot be used under conditions of tension or compression.”

Barron—Modern Synthetic Rubbers (1943).

That affiant recently had Exhibits 21 and 22 inspected and measured by qualified experts who state unqualifiedly that “cold flow” is the cause of the protrusion now by a few thousandths of an inch of the outer radial face of the molded resilient sealing member beyond the cup bottom and that this “cold flow” has resulted from the compression of the garter spring to which the sealing member has been subjected for over ten years;

That in view of defendant's reliance upon the present appearance of these Exhibits for invalidating the patent in suit it is essential that testimony be introduced in this cause to explain the facts substantially as above stated; and

That the herein motion is made in good faith in furtherance of justice and equity and is not made for delay.

A. DONHAM OWEN,
Counsel for Plaintiff. [23]

Subscribed and sworn to before me this 18th day of May, 1946.

[Seal] ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires May 16th, 1948.

[Endorsed]: Filed May 21, 1946. [24]

In the United States District Court for the
Northern District of California, Southern
Division.

Civil Action No. 236970

Suit for Infringement of Letters Patent No.
2,146,677.

NATIONAL MOTOR BEARING CO., INC., a
corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a corporation,
Defendant.

MOTION FOR PERMISSION TO TAKE
PROOFS AS TO DEFENDANTS UN-
PLEADED SO-CALLED VICTOR ANTICI-
PATION.

Now comes the plaintiff above named and in ac-
cordance with the practice in Courts of Equity
moves the Honorable Court for an order permitting
it to take by deposition or in open court testimony
relating to important facts in regard to an alleged
defense, which was not pleaded in defendant's
answer, and which is mentioned for the first time
in defendant's brief at pages 6, 13, 29. [25]

The substance of this alleged defense is that the
Johnson patent in suit is valid on the ground that
the defendant's Type A and H seals have been
made and sold prior to the filing date of the John-
son patent. This defense is based in defendant's

brief on the argument that plaintiff's Exhibits 20 and 21, the early embodiments of the Johnson invention, allegedly do not disclose the invention claimed in the Johnson patent.

Investigation since receipt of defendant's brief has disclosed that Exhibits 21 and 22, being like the seals of the patent in suit and made by plaintiff in 1935, about eleven years before the trial, have had the synthetic sealing member change shape over what it was at the time when the seals were originally made and tested and shown to the Patent Office, and that this change in shape now relied on by defendants, has in fact been caused by a characteristic of the particular Thiokol material employed and known in the text books and to rubber authorities as "Cold Flow."

Counsel for defendant apparently not realizing the causes for such change in form of the sealing member over the eleven year period, nor having an explanation in the record for said changes, now argues that the invention was not reduced to practice at the time Exhibit 22 was shown to the Patent Office.

The record does not clearly and correctly reflect the true facts as to Exhibits 21 and 22.

Plaintiff asks leave of this Honorable Court for an order permitting plaintiff to take testimony, either in open [26] court or by depositions, as the Court may choose, to set forth the true facts with regard to the nature of the reduction to practice of the invention by Exhibits 21 and 22.

The grounds for this motion are:

That the record is incorrect as it stands;

That the record can be corrected to state properly the true facts;

That no harm will be done to either party by having the true facts before the court;

That to have the true facts will serve justice and will materially affect the result and decision of the case so far as the said alleged defense is concerned;

That defendant's reliance on its brief on this unpleaded defense could not have been foreseen by plaintiff; and

That the only just and speedy and proper manner of deciding this case will be to take further testimony.

On the hearing of said motion plaintiff will rely upon and read from the pleadings and papers on file herein and on the following points and authorities:

Schick Dry Shaver, Inc., et al. v. General Shaver Corp., 26 F. S. 190 (Conn.)

Schlumberger Well Surveying Corporation v. Hilliburton Oil Well Cementing Co., 41 F. S. 345 (Texas).

Rules of Civil Procedure Numbers 1, 15b (last sentence). [27]

A. DONHAM OWEN,
Counsel for Plaintiff.

Dated: May 18, 1946.

Service of a copy of the above motion acknowledged this 20th day of May, 1946.

A. W. BOYKEN,
Of Counsel for Defendant.

[Endorsed]: Filed May 21, 1946. [28]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO TAKE ADDITIONAL PROOFS

Plaintiff's motion sets forth that it is to take proofs as to a defense which was not pleaded and was mentioned for the first time in defendant's brief. The defense is that the patent in suit is invalid because the accused structures were made and sold in June and July, 1936, prior to the filing date of the patent in suit. The defense is alleged to be based on the argument that the exhibits produced by plaintiff as made in 1935 do not embody the invention of the patent in suit. It is alleged that since receiving defendant's brief, plaintiff has investigated and found that the alleged 1935 seals changed in shape since 1935 and so do not disprove the plaintiff's claim of having completed the invention in suit in 1935.

The motion is supported by an Affidavit of Mr. Owen, counsel for plaintiff. In opposition, reliance is placed upon facts and admissions established in open court at the trial herein.

Six "grounds" for the motion are set forth by plaintiff. We discuss them seriatim:

(1) That the record is incorrect as it stands

The answer to this ground is that it is not true. The belated offer of proof now made by plaintiff will not establish that the record is incorrect. Mr. Owen states in his affidavit, page 2, that he and the Primary Examiner examined the seal, Exhibit 22

“to see that it conformed substantially to the print, Exhibit 23, and to the claim.” The drawing which was before the Patent Office, which appears in defendant’s Exhibit AAA, and which was filed in the Patent Office with Johnson’s affidavit on November 28, 1938, showed the sealing element projecting beyond the rim of the cup. No doubt Exhibits 21 and 22 did at [29] that time conform to that drawing. They do today. As to Mr. Owen’s statement that Exhibit 22 “conformed substantially” to the claim in 1938, we note a remarkable similarity. They doubtless did “conform substantially” but they do not justify the element of the claim of the patent requiring that the molded resilient member at its radial face “lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.”

Johnson on testifying was presented with the following questions:

“Q. Will you take this one, the one that has been marked as Plaintiff’s Exhibit 22. I will give you a straight edge. Now, tell me that if after the offset—no, I read from the claim of the Johnson patent in suit, ‘a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material

is protected from wear by contact with adjacent moving parts.' Where is the molded material in reference to the bottom of the cup in the sample that you have in your hand?" (Tr. 254-255.)

And the witness answered:

"A. Well, the inside bottom or outside bottom?

Q. The outside bottom.

A. It is right here.

Q. Put a straight edge on it. What do you say?

A. What do you want me to say?

Q. I want you to say whether the language I have read applies to the structure you hold in your hand? A. Substantially it does."

In passing we note that this work "substantially" is the one also used by Owen in his affidavit. The question and answers then continued:

"Q. By the work 'substantially' you mean that it does not, don't [30] you? That is like things being practically the same, indicating that they are different.

A. I mean this, that in this particular sample there is some rubber protruding, maybe here.

Q. That is not like Type A here accused, is it, where we have this inset?

A. You have the inset all right.

Q. The rubber comes clear out and some-

what beyond the bottom of the cup than the one you hold in your hand? A. Yes.

Q. So it doesn't come within the claim of the patent in suit, does it, asking you as a patent expert? A. No." (Tr. 255.)

Continuing at Transcript 255 and 256, Johnson came to the same conclusion in regard to Plaintiff's Exhibit 21.

If the case be reopened and plaintiff produces the "qualified Experts" to whom Mr. Owen refers in his affidavit, page 4, and those experts were to testify that in their opinion "cold flow" caused the sealing member to project beyond the cup bottom, this would still not show the present record in error. The drawing filed in the Patent Office in 1938 showing the sealing element projecting beyond the cup bottom, together with the production of Exhibits 21 and 22 in conformity with that drawing, cannot be refuted by opinions of experts.

(2) That the record can be corrected to state
property the true facts

The answer to this "ground" is that the record is correct as it stands. Moreover, it is no true ground for reopening a case. Oftentimes an apprehensive litigant will wish to "correct" a record after the evidence is all in. Not only is a real showing required in a proper case, but here the error of plaintiff's showing already appears of record.

(3) That no harm will be done to either party by
having the true facts before the court

This is based upon an incorrect premise that the

true facts are not now before the court. However, to reopen the evidence, take additional evidence, withdraw briefs, rewrite and reprint briefs would be expensive. Since there is no showing that any different result [31] could be reached were the case reopened, defendant should not be put to the additional expense.

- (4) That to have the true facts will serve justice and will materially affect the result and decision of the case so far as the said alleged defense is concerned

The additional evidence cannot have bearing upon each of the following independently conclusive defenses:

1. Anticipation by the Gits prior public use. (Deft's Brief, pps. 18-20.)
2. Anticipation by the patent to Winter No. 2,089,461, the patent to Fitzgerald No. 1,983,746, the patent to Chandler No. 1,905,800, the patent to Heinze No. 2,071,403, and the patent to Heinze No. 2,116,240 (Deft's Brief, pps. 22-29.)
3. Lack of invention over a plurality of prior art patents. This is shown by the patents themselves, the file history of the patent in suit, and the fact that plaintiff has never made a Johnson seal but instead pays a license fee to a competitor to produce a seal with a leather sealing element. (Deft's Brief, pp. 30-35, 38-42.)

4. Invalidity under Section 4888 of the Patent Act because its elements do not emerge from the specification. (Deft's Brief, pp. 42-45.)
 5. Non-infringement because neither of the accused seals performs the function called for in the claim. (Deft's Brief, pp. 48-50.)
 6. Non-infringement by Type H seal which does not have an axially, inwardly, offset, radial flange. (Deft's Brief, pp. 50-55.)
- (5) That defendant's reliance on its brief on this unpleaded defense could not have been foreseen by plaintiff.

This is plainly in error. Whether pleaded or unpleaded, prior art is admissible to invalidate. Defendant offered evidence, and it was received without objection, to show that the accused [32] seals were manufactured and on sale in June and July of 1936, prior to the filing of the Johnson application (Tr. 175-180, Deft's Ex. AAF, AAG, and AAH). This made it wholly clear that in no event could the claim of the Johnson patent in suit be made to read upon the accused structures and still be held valid. This occurred at the hearing on January 24, 1945. The following day, January 25, 1946, plaintiff sought to meet this by having Johnson produce the alleged 1935 seals, Exhibits 21 and 22 (Tr. 221). On cross-examination defendant brought out that these seals were not within the patent claim (Tr. 255, 256). It thus appeared before plaintiff's rebuttal proofs were

closed and while Johnson was still on the witness stand, that the accused seals were made and sold prior to the filing of Johnson's patent application and that the seals he said he made in 1935 were not within the patent. It was evident at that time that if the accused seals met the claim for the purposes of infringement, they met the claim as prior art and the Johnson patent claim could not be held to be infringed by them.

It is not sufficient that Mr. Owen makes oath that he was surprised. It was nevertheless plainly foreseeable on January 25, 1946 when Johnson was cross-examined, that defendant would urge that the accused seals were prior to Johnson's filing date. If there be surprise in this situation it is that Johnson, on redirect examination, was not asked to and did not volunteer the information that the seals had changed in some way since 1935. It took almost four months for this suggestion to appear in the case.

- (6) That the only just and speedy and proper manner of deciding this case will be to take further testimony

Plaintiff's original brief was due on March 6 (by stipulation extended from February 24). The brief was filed on March 13. Plaintiff's reply brief was due on May 20 and it is not yet filed. Instead the present motion was brought. The just, speedy and proper manner to proceed in the case is to deny the present motion and allow plaintiff one week in which to reply to defendant's brief.

Mr. Owen's affidavit shows that he "was at a loss to understand" that the sealing members projected beyond the radial plane of the cup bottom on Exhibits 21 and 22. The affidavit does not show when this first occurred but it must have been on January 25th when Johnson, on cross-examination, pointed it out. Mr. Owen's affidavit further shows that the investigation upon the basis of which the case is proposed to be reopened, took place some three months later. Ordinary diligence would have suggested prompt investigation. For more than ten years Exhibit 21 was in the possession of Johnson. Exhibit 22 was in the possession of plaintiff's counsel (Affidavit of Mr. Owen, pages 1 and 2). Throughout all of this time, Johnson was familiar with "cold flow" as shown by the patent itself, page 1, lines 51-52 in respect to which he asserts defects in prior structures which his alleged invention would eliminate.

It is respectfully submitted that the motion to reopen should be denied and plaintiff given a short time in which to file a reply brief.

A. W. BOYKEN,
GEO. I. HAIGHT,
Counsel for Defendant.

Received a copy of the above and within memorandum this day of May, 1946.

Counsel for Plaintiff.

[Endorsed]: Filed May 27, 1946. [34]

[Title of District Court and Cause.]

ORDER REGARDING OPENING OF PROOFS

Upon motion by plaintiff, argued, briefed and submitted on May 27, 1946, the Court being fully advised in the premises, it is hereby Ordered:

1. That permission is hereby given plaintiff to take depositions in Chicago, Illinois, within thirty days from the date hereof, to set forth the true facts with regard to the nature of the reduction to practice of the invention.
2. That permission is hereby given defendant to take any rebuttal depositions in Chicago, Illinois, immediately following those of plaintiff.
3. That Exhibits AAA, 20, 21, 22 and 23 may be temporarily withdrawn by Mr. Owen, counsel for plaintiff, for the purpose of taking said exhibits to Chicago where they are to be open for inspection at the time such depositions are taken, said exhibits to be returned by Mr. Owen to the files of this Court after such depositions are completed.
4. That this suit shall be submitted on July 29, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

Dated:

Approved:

Attorney for Plaintiff.
A. W. BOYKEN,
Attorney for Defendant.

Received plaintiff's exhibits 20, 21, 22, and 23,
and defendant's exhibit AAA.

ROBERT E. WICKERSHAM.

6/3/46 c.c.

Exhibits returned 6/10/46.

ALVIN DASPIT,

Deputy Clerk.

[Endorsed]: Filed May 29, 1946. [36]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The evidence convinces me that the patent in suit does not disclose invention and is anticipated by the prior art. It represents the contribution of the artisan to the art and not that of the inventor. Furthermore the delay in bringing the action prevents the exercise of the equity powers of the Court, assuming they are invocable. There is no need therefore to resolve the issue of infringement and I do not decide it.

The bill of complaint will be dismissed upon Findings of Fact and Conclusions of Law to be submitted pursuant to the Rules.

Dated: September 27, 1946.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed Sep. 27, 1946. [37]

[Title of District Court and Cause.]

FINDING OF FACT AND CONCLUSIONS OF LAW

FINDING OF FACT

1. This is a suit under the patent laws of the United States for infringement of Letters Patent of the United States No. 2,146,677 granted on application of Lloyd A. Johnson.

2. The plaintiff, National Motor Bearing Co., Inc., a California corporation, has been in the business of manufacturing shims since 1922, and has been manufacturing oil seals since October, 1930.

3. The defendant, Chanslor & Lyon Co., a California Corporation, operates sixteen stores in California, selling automobile merchandise of all kinds.

4. The plaintiff is the owner of United States patent to Johnson No. 2,146,677 and is entitled to sue for infringement thereof.

5. Oil seals, sold by the defendant and manufactured by the Victor Manufacturing & Gasket Co., Plaintiff's Exhibits 6 and 7, known as Type A and Type H respectively, are charged to infringe the Johnson patent.

6. The single claim of the Johnson patent is limited to an oil seal comprising a cup member and a sealing member. The cup member is one "having a peripheral portion and an axially inwardly offset radial flange." The sealing member is defined as a "molded resilient" one. The claim specifies that the sealing member be "bonded to both sides of

said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.” [38]

7. Prior to the filing of the Johnson application on August 5, 1936, and prior to an alleged reduction to practice by Johnson in 1935 oil seals comprising a cup member and a molded resilient sealing member were old.

8. The crowded state of the fluid seal art is shown by the Johnson File Wrapper and contents, by the prior art patents introduced in evidence, and by admission of the plaintiff.

9. Beginning in 1933 Remi J. Gits, worked with the B. F. Goodrich Rubber Co. and the Spicer Manufacturing Corp. to develop a sealing member of synthetic material for use with a cup member having a peripheral portion and an axially inwardly offset radial flange. Difficulty was encountered due to the then unperfected material, Koroseal, which was used. Various samples were made, some of which were not satisfactory when tested. Several samples were made, some of which were not satisfactory when tested. Several samples were tested by installation in shock absorbers by the Spicer Manufacturing Corp., subjected to 4,000,000 to 5,600,000 reciprocating strokes and found “okeh.” At least one seal was installed in an automobile. By April 16, 1934, the Gits Oil seal was reduced to practice.

10. The structure of the Gits seal is shown by the Gits patent No. 2,052,762 issued on Sept. 1, 1936, on application filed December 17, 1935.

11. The Gits seal was an oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in a housing.

12. The Gits oil seal, reduced to practice in 1934 and described in patent application filed Dec. 14, 1935, had a cup member having a peripheral portion and an axially inwardly offset radial flange, described in the Gits specifications as a "cup shaped cylindrical shell having an inwardly extending [39] flange at one end." Gits described the axially inwardly offset portion of the flange as follows: "the inner margin of the flange 2 * * *, is offset inwardly as at 4, . . . the offset portion 4 extending in a generally radial direction."

13. The Gits Oil Seal had a molded resilient sealing member, described by Gits as "preferably moulded from a suitable flexible material such as synthetic rubber or the like."

14. The Gits Oil Seal had the sealing member bonded to both sides of the radial flange at the offset so that its outer radial face lay within the radial plane of the cup bottom where it bent inward to form the offset. Gits secured this bond by expanding a clamping ring outwardly, forcing the sealing member against the edge of the offset portion of the cup flange and causing a portion of the sealing member to be extruded over the edge so as to overlap the offset portion. The sealing member and

clamping ring were flush with the end face of the cylindrical cup member.

15. The record shows that in no oil seal of the type here involved could a portion of the cup member protect the sealing element, or the material of which it is made, from wear by contact with adjacent moving parts, for an appreciable period of time; because the resulting wear on the cup member would cause failure of the seal. To the extent that the cup member of the Johnson patent might perform this function, the cup member of Gits could likewise perform the function. The Johnson specification does not mention this function. Gits specification states, "when the seal is inserted in a housing it may flatly abut the inner end of the housing or any other means that might come into engagement with the seal when it is in operative position."

16. The Johnson patent No. 2,146,677 is anticipated by the prior public use and prior knowledge of the Gits seals and is invalid. [40]

17. Plaintiff's Exhibits 21 and 22 are oil seals which were made by Harold Klein, an employee of plaintiff, in the late summer or fall of 1935. These exhibits do not come within the claim of the Johnson patent. After briefs of both parties were filed, proofs were reopened and plaintiff called one witness who testified that, as made, the exhibits came within the patent claim. He identified five drawings as having been made in 1935 and as disclosing the invention.

18. The sealing elements in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22 were made of a material known as Thiokol which had such a tendency to cold flow that it was not operable in an oil seal.

19. Plaintiff's Exhibit 21 and other seals were subjected to tests in a laboratory in 1935. In the course of these tests, no adjacent moving part touched the oil seal being tested except the shaft which projected through it. Details of the test were not proved. The tests did not establish that the seals could perform their intended function under service conditions. The tests were not sufficient to constitute a reduction to practice.

20. The plaintiff failed to prove any reduction to practice prior to the constructive reduction to practice by the filing of the Johnson patent application on August 5, 1936.

21. Gits Patent No. 2,052,762 for which application was filed on December 14, 1935, is prior art as to the Johnson patent and anticipates the Johnson patent.

22. The accused type A oil seals, Plaintiff's Exhibit 6, were offered for sale in June, 1936 and first sold in July, 1936, prior to the filing of Johnson's patent application. The record does not show during what period the defendant offered them for sale. Their manufacture was discontinued in the latter part of 1939. [41]

23. The accused type H oil seals, Plaintiff's Exhibit 7, were offered for sale in July, 1936, prior to the filing of Johnson's patent application, and

were first sold in November, 1936. The record does not show during what period the defendant offered them for sale.

24. Johnson Patent is anticipated by the prior knowledge and prior public use of seals made by the Victor Manufacturing and Gasket Company known as types A and H the accused structures herein exemplified by Plaintiff's Exhibits 6 and 7.

25. In the oil seal art and in the Johnson patent to bond the sealing element to the metal cup member means merely to unite them firmly by any means.

26. Prior to Johnson, bonding by use of an adhesive, by clamping, and by molding or vulcanizing with or without perforations in a flange in the cup member, were known equivalents and were treated as equivalents in the Johnson specification.

27. The Winter Patent No. 2,089,461 for which application was filed September 18, 1933, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Winter patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

28. The Fitzgerald Patent No. 1,983,746 issued December 11, 1934 disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Fitzgerald patent

disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

29. The Chandler Patent No. 1,905,800 issued April 25, 1933, disclosed a sealing element bonded to a flange on the [42] cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Chandler patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

30. The Heintz Patent No. 2,071,403 application for which was filed April 9, 1934, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Heintz Patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson Patent.

31. The Heintz Patent No. 2,116,240, for which application was filed August 30, 1933, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Heintz Patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

32. The Plaintiff, the second largest producer of oil seals in the United States and the Chicago Rawhide Company, the largest producer of oil seals in the United States, both manufacture under a patent owned by the Chicago Rawhide Company and neither have produced any seals commercially under the Johnson patent.

33. The Johnson patent has received no tribute from the industry. Two months after the Johnson patent issued, the Plaintiff offered it for sale to the Victor Manufacturing & Gasket Company which suggested \$1500 or \$2000 as its "nuisance value." Plaintiff's president rejected this suggestion, stating that he preferred to hold the patent "for trading purposes."

34. The disclosure of the Johnson patent represents at most the contribution expected of one skilled in the art.

35. The Johnson patent is invalid for lack of invention over the prior art. [43]

36. The accused structures were on sale beginning in the summer of 1935. The plaintiff admitted knowledge of them as early as 1937. In February 1939, the month in which the patent in suit issued, the plaintiff purchased seals of the type here accused from the defendant. Thereafter, the plaintiff made no charge of infringement to defendant until it filed the complaint herein on September 18, 1944. This delay constituted laches.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. The claim of the Johnson patent is invalid for lack of novelty.

3. The claim of the Johnson patent is invalid for lack of invention.

4. The defendant is entitled to a decree dismissing the complaint, and for costs.

.....

United States District Judge.

Dated:

[Endorsed]: Lodged 10-18-46. [44]

[Title of District Court and Cause.]

CORRECTIONS TO FINDINGS

Without admitting in any way the correctness of any of the findings, when compared with the evidence of record, we propose that the following most glaring mistakes as to recitation of facts be corrected.

Re Finding No. 9

Defendants proposed finding No. 9 is not correct in that it omits and assumes facts and then ends up with a sentence containing a conclusion of law which is not supported in the least by the record. For example, the next to last sentence reads [45] "At least one seal was installed in an automobile." To be a true statement of fact the sentence should go on and state what the undisputed testimony shows; namely, that "the damn things leaked" (Dep. tr. P. 15 Q57). Such a record will not support any conclusion of reduction to practice. To be a reduction to practice the device must be a success. Another example of fact assumption in finding No. 9 is Defendant's failure in its deposition testimony to show that the seals which made 4,000,000 to 5,600,000 strokes were the structure of the Gits seal

in question here. Tarbox, who made the tests, said "that No. 85, I don't think it always refers to that particular construction. I am not positive" (Dep. Tr. 31 Q84). According to Gits the No. 85 was different.

If the Court wishes to make any finding about Gits the following would be supported by the record.

Corrected Finding No. 9: Beginning in 1933 Remi J. Gits, worked with the B. F. Goodrich Rubber Co. and the Spicer Manufacturing Corp. to develop a sealing member of synthetic material for use with a cup member having a peripheral portion and an axially inwardly offset radial flange. Difficulty was encountered due to the then unperfected material, Koroseal, which was used. Various samples were made, some of which were not satisfactory when tested. Several samples were tested by installation in shock absorbers by the Spicer Manufacturing Corp., subjected to 4,000,000 to 5,600,000 reciprocating strokes and found "okeh" but the record is not clear what was the construction of those seals. At least one seal was installed in an automobile but they "leaked." Gits was trying for 2½ years to make an oil seal for Spicer Manufacturing Corp., but the Gits seals scored and leaked. Gits seals were [46] never made or sold for actual use to Spicer Manufacturing Corp. The experimental research engineer for the Spicer Manufacturing Corp. concluded as to the Gits' seal: "The seal was not successful. We

would not bother with it.” and “The final test on them showed they were not satisfactory.”

Re Finding No. 10.

Correct the date of application to read December 14, 1935.

Re Finding No. 12

The words “reduced to practice in 1934” in the first line are improper as a conclusion of law, assuming something not yet found. Furthermore, they have no bearing on Finding No. 12 and are surplusage, besides being contrary to the record as pointed out in the discussion above on Finding No. 9.

Re Finding No. 14

The incorrect words in Defendant’s proposed Finding No. 14 are the words “bonded to both sides of.” Apparently it is Defendant’s purpose to have the Court make a finding of equivalency between the Gits device and the patent in suit. In that case the structures should be compared and found equivalent or not equivalent. Expressions using the words “bonded” or “bonding” are misleading and do not set forth the necessary facts about structural similarity or dissimilarity. Defendant’s proposed [47] statement that in Gits the Sealing member is “bonded to both sides of the radial flange at the offset” is not the fact. A correct finding on which the Court could conclude that there is equivalency or not equivalency should read as follows:

Corrected Finding No. 14

The Gits oil seal had a cup member with a radial flange 4 offset inwardly from the radial plane of the cup bottom 2 a sealing or packing member 5 with a positioning flange 8 and a cylindrical portion 6 to be clamped against the adjacent cylindrical peripheral wall 3 forming a hole in the offset flange. The ring 11 is expanded radially to wedge the cylindrical portion 6 between the ring 11 and the hole 3 of the case.

The device of the patent in suit (Fig. 1) has a cup member with a radial flange 17 offset inwardly from the radial plane of the cup bottom 20, a sealing member 7 which has its radial portion split into two parts (when viewed in cross-section) so that one radial portion 12 lay on one side of the offset flange and the other radial portion 18 lays on the other side of the offset flange. The split sealing member is secured to both sides of the radial offset flange 17 by cementing or vulcanization and is called bonding in the patent.

The difference in the Gits device and the patented device is that Gits clamps the cylindrical portion 6 against the wall 3 of the hole in the offset flange whereas the patented device holds the sealing member by splitting its radial flange and fastening it against both radial faces of the inwardly offset flange.

Re Finding No. 15

This finding should be corrected by changing the opening phrase "The record shows" to read "It has the opinion of Defendant's expert."

Re Finding No. 16

This is a conclusion of law and not a finding of facts. There is no indication in the memorandum opinion that the Court has so concluded as to Gits. Certainly it is not in accordance with the record that Gits anticipated the patent in suit for it failed at Spicer and was abandoned, whereas, Defendant later was able then to sell Spicer the seal in suit which was a success. The principal difference in the two seals is as pointed out above in Corrected Finding No. 14, namely, that the patent in suit split the radial flange of the sealing member and secured it to both radial faces of the inset flange, whereas Gits tried to clamp a cylindrical portion 6 to the cylindrical wall 3 of the hole in the inset flange 4.

Re Findings Nos. 17, 18 and 19

These findings have to do with the fact that Exhibit 21, the oil seal made and tested successfully by Klein in 1935, has since then changed shape due to "cold flow" so that now the outside radial part of the sealing member projects out in places a few thousandths of an inch beyond the bottom of the cup. Rubber expert Stewart testified that this was to be expected from the material due to the spring pressure exerted on the sealing lip [49] during the intervening eleven years. There is no testimony to rebut the witness Klein who stated that when he

made and tested the device in 1935 the sealing member came within the radial plane of the cup bottom. Nor is there testimony to rebut that of Mr. Johnson and Mr. Klein that in 1935 Exhibit 21 tested very satisfactorily in apparatus simulating actual working conditions. The only conclusion on this testimony is that there was in 1935 a reduction to practice of the invention in suit. The Courts memorandum opinion made no reference to this part of the case therefore Defendant's proposed findings 17 to 20 inclusive are a stab in the dark. If the Court desires to make any findings on this phase of the case they should be corrected as follows to make them complete and in conformance with the record.

Corrected Finding No. 17.

Plaintiff's Exhibits 21 and 22 are oil seals which were made by Harold Klein, an employee of plaintiff, in the late summer or fall of 1935. These exhibits do not now come within the claim of the Johnson patent by a matter of a few thousandths of an inch. After briefs of both parties were filed, proofs were reopened and plaintiff called the witness Klein who testified that, as made, the exhibits came within the patent claim. He identified five drawings as having been made in 1935 and as disclosing the invention.

Corrected Finding No. 18.

The sealing elements in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22 were made of a ma-

terial known as Thiokol which had such a tendency to cold flow that it is not now regarded as a good material for oil seals, but as [50] used in Exhibit 21 it did not operate successfully for the full 28 days of the test which was run to determine the practicability of the construction of the device in suit.

Corrected Finding No. 19.

Plaintiff's Exhibit 21 was subjected to tests in Plaintiff's laboratory where it has apparatus which simulates actual applications and it was given the regular tests that are given for a seal for general use (Dep. Tr. p. 8). In the course of these tests, no adjacent moving part touched the oil seal being tested except the shaft which projected through it and the housing in which it was held. The tests were sufficient to simulate actual working conditions and the uncontradicted testimony is that they were satisfactory therefore there was a reduction to practice of the invention by Plaintiff in the fall of 1935.

Re Findings Nos. 20 and 24

These findings relate to facts not mentioned in the Court's memorandum opinion and therefore the Court may or may not wish to make findings on them. The erroneous premise on which these findings Nos. 20 and 24 can have relevancy is that Exhibit 21 did not test successfully under conditions like it would get in general service. All the testimony was that it did test well. To have support for

findings 20 and 24 the Defendant would have to get the Court to enter Plaintiff's erroneous finding No. 19. The incomplete and erroneous nature of Finding No. 19 as proposed by Plaintiff has just been exposed above. [51]

Corrected Finding No. 20.

The invention of the Johnson Patent was reduced to practice in October 1935, about 10 months before the filing of the Johnson patent application on August 5, 1936.

Corrected Finding No. 24.

Johnson Patent is not anticipated by the knowledge and public use of seals made by the Victor Manufacturing and Casket Company known as Types A and H, the accused structures herein, exemplified by Plaintiff's Exhibits 6 and 7 as they were not prior to Johnson's reduction practice.

Re Finding No. 21

If this is the anticipation which the Court had in mind in its memorandum opinion there is no formal objection we can make, though we do not agree with the Court. If it is not what the Court had in mind then the finding of anticipation by Gits should be omitted.

Re Findings Nos. 25 and 26

These findings are an attempt to get findings which would in effect nullify all the work done by the oil seal division of the Patent Office which has granted over 1,000 patents on oil seal constructions

and taken over \$60,000 in Government fees from the public. If Defendant's definition of "bonding" as proposed in these findings Nos. 25 and 26 were to be accepted, then the Patent Office should have closed up its oil seal division and have refused to accept any more applications after it granted [52] the first oil seal patent where a sealing member was held in a cup member. It is not that the sealing member is fastened in the cup member, but, How is it fastened and What is the structure of the parts that are fastened? Gits failed because the expended ring 11 did not adequately secure the neck 6 on the wall of the hole 3. The device in suit came along and was a success (even at Spicer where Gits had failed) because in effect it split the radial flange of the sealing member and secured the split portions to the opposite sides of the inwardly offset flange of the cup member. No one in the art had done that before. There is no express evidence of equivalency of all kinds of securing of sealing members in place and the fact of there being so many patents on oil seal devices is positive evidence that the art and the Patent Office believe otherwise. Even this Victor Company which defends this present case has taken out over 50 patents on various ways of holding in the sealing members in oil seals.

Re Findings Nos. 27, 28, 29, 30 and 31

These proposed findings illustrate exactly what we said above about Findings 25 and 26. If the Court accepts the finding about Chandler then it should go on at the end and say that the Commis-

sioner of Patents erred in granting the Johnson patent thereover. The Commissioner had the Chandler patent before him and held there was not equivalency between this and the Johnson structure. Defendants expert on cross-examination admitted there was no substantial difference in the case members of Winter, Fitzgerald or Heintz over the art considered by the Patent Office.

Mohr v. Alliance,

14 F (2d) 799, 800 (C.C.A. 9) and

Park-In Theatres v. M. A. Rogers,

130 F (2d) 745, 747 (C.C.A. 9) [53]

Re Finding No. 32

This should be amended by adding at the end: "The Victor Manufacturing and Gasket Company, who are in control of and defending this case brought against their customer, the nominal defendant Chanslor and Lyon Company, manufactured and sold large quantities of the Type A and the Type H seals, subsequent to the Gits experiment, and prior to and since the grant of the Johnson patent in suit."

Re Finding No. 36

This should be amended by inserting before the period and after the date "September 18, 1944," the following:

"but the Plaintiff notified the manufacturer, Victor, of such infringement in 1939 promptly upon issuance of the patent."

Note: It is considered better practice among

ethical manufacturers for the owner of the patent which is being infringed to notify the manufacturer and not the customers or dealers of that manufacturer.

Respectfully submitted,

A. DONHAM OWEN,
Counsel for Plaintiff.

Dated: November 14, 1946.

Service of a copy of the above corrections acknowledged this 14th day of November, 1946.

/s/ A. W. BOYKEN,
Of Counsel for Defendant.

[Endorsed]: Filed Nov. 18, 1946. [54]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

The defendant and plaintiff having submitted proposed findings and counter-findings respectively, and it appearing to the court that the same are in unnecessary detail, the Court now makes its own finding of facts as follows:

I.

This is a suit under the patent laws of the United States for infringement of Letters Patent of the United States No. 2,146,677 granted on application of Lloyd A. Johnson.

II.

The plaintiff, National Motor Bearing Co., Inc., a California corporation, has been in the business of manufacturing [55] shims since 1922, and has been manufacturing oil seals since October, 1930.

III.

The defendant, Chanslor & Lyon Co., a California corporation, operates sixteen stores in California, selling automobile merchandise of all kinds.

IV.

The plaintiff is the owner of United States patent to Johnson No. 2,146,677 and is entitled to sue for infringement thereof.

V.

Oil seals, sold by the defendant and manufactured by the Victor Manufacturing & Gasket Co., Plaintiff's Exhibits 6 and 7, known as Type A and Type H respectively, are charged to infringe the Johnson patent.

VI.

The Johnson patent and the claim thereof are void and of no force and effect in law because the alleged invention and improvement claimed to be therein described, disclosed and claimed, have been long prior to the alleged invention or discovery thereof by the said Johnson, or more than two years prior to his alleged application for said patent, patented, described and fully disclosed to the public in various patents including the following: United States Patent No. 1,905,800 to Chandler issued April 25, 1933; United States Patent No. 1,983,746 to Fitz-

gerald issued December 11, 1934; United States Patent No. 2,052,762 to Gits issued September 1, 1936; United States Patent No. 2,071,403 to Heinze issued February 23, 1937 and United States Patent No. 2,089,461 to Winter issued August 10, 1937; that the said Johnson was not the original, first and true inventor or discoverer thereof, or of any material or substantial part of the Fluid Seal claimed to be patented in said patent, but that the same had been in public use and on sale in this country for more than two years prior to Johnson's application for said patent; and that each and every part thereof had been invented, discovered, used by or known to others in this country and elsewhere before the alleged invention, discovery or appropriation thereof by Johnson; that in view of the prior art existing at the time, there was no invention in what Johnson claims to have invented.

VII.

The Johnson Patent and the claim thereof are invalid and of no force and effect in law for the reason that they involve nothing more than ordinary mechanical and engineering skill and practice and are therefore totally lacking in patentable novelty and invention.

VIII.

The accused structures were on sale beginning in the summer of 1935. The plaintiff admitted knowledge of them as early as 1937. In February 1939, the month in which the patent in suit issued, the plaintiff purchased seals of the type here accused

from the defendant. Thereafter, the plaintiff made no charge of infringement to defendant until it filed the complaint herein on September 18, 1944. This delay constituted laches.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter.

II.

The claim of the Johnson patent is invalid for lack of novelty. [57]

III.

The claim of the Johnson patent is invalid for lack of invention.

IV.

The defendant is entitled to a decree dismissing the complaint, and for costs.

Dated: November 27, 1946.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 29, 1946. [58]

In the United States District Court for the Northern
District of California, Southern Division

No. 23697-G

NATIONAL MOTOR BEARING, INC., a Corpo-
ration,

Plaintiff,

vs.

CHANSLOR & LYON CO., a Corporation,

Defendant.

FINAL JUDGMENT

This cause came on to be heard, the counsel for the respective parties having filed briefs and thereupon, upon consideration, it was Ordered, Adjudged and Decreed as follows:

1. That the patent to Johnson, No. 2,146,677, and the single claim thereof is invalid.

2. That the Bill of Complaint be dismissed with costs in the amount of \$. to be taxed by the Clerk.

Dated: November 29, 1946.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 5(d).

A. DONHAM OWEN,
Attorney for Plaintiff.

Receipt of a copy of the foregoing Final Judgment is acknowledged this 18th day of October, 1946.

A. DONHAM OWEN. [59]

[Endorsed]: Filed & Entered Nov. 29, 1946. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73 (b)

Notice is hereby given that National Motor Bearing Co., Inc., plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on November 29th, 1946.

A. DONHAM OWEN,
Attorney for Plaintiff.

Dated: February 25, 1947.

[Endorsed]: Filed Feb. 25, 1947. [61]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL PAPERS AND
EXHIBITS

Pursuant to Rule 75(i) of the Rules of Civil Procedure it is hereby ordered that the originals of all exhibits and the transcripts of testimony in this case be sent to the Appellate Court in lieu of copies, with the understanding that the Clerk of the

Appellate Court will make suitable provision for their safekeeping and will return them when the case is completed on appeal.

LOUIS E. GOODMAN,
United States District Judge.

Dated: March 14th, 1947. [69]

A copy of the foregoing Order as to Original Papers and Exhibits has been served on counsel for defendant, A. W. Boyken, Esq., by mailing two copies of the same to his office in the Crocker Building, San Francisco, California, this 12th day of March, 1947.

A. DONHAM OWEN.

[Endorsed]: Filed Mar. 14, 1947. [70]

District Court of the United States, Northern
District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 78 pages, numbered from 1 to 78, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of National Motor Bearing Co., Inc., a corp., Plaintiff, vs. Chanslor & Lyon Co., a corp., Defendant, No. 23697 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$16.50, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 2nd day of May, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [79]

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 23,697-G

NATIONAL MOTOR BEARING COMPANY,
Plaintiff,

vs.

CHANSLOR & LYON COMPANY,
Defendant.

Before: Hon. Louis E. Goodman,
Judge

REPORTER'S TRANSCRIPT

Wednesday, January 23, 1946
10:00 o'Clock A.M.

Counsel Appearing:

For Plaintiff: A. Donham Owen, Esq.

For Defendant: Geo. I. Haight, Esq., A. W. Boy-
ken, Esq., Carl F. Geppert, Esq. [1*]

The Clerk: National Motor Bearing Company v.
Chanslor & Lyon, for trial.

Mr. Boyken: Ready for defendant.

Mr. Owen: Ready, your Honor. [2]

Now, I think we can start in with our proofs.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

The patent in suit, Johnson No. 2,146,677, we offer as Plaintiff's Exhibit 1.

The Court: Very well.

(The patent referred to was marked Plaintiff's Exhibit 1 in evidence.)

[Plaintiff's Exhibit No. 1 appears in Book of Exhibits.]

Mr. Owen: I believe that Mr. Haight is willing to stipulate that title to that patent stands in the plaintiff; is that correct?

Mr. Haight: We will so stipulate.

Mr. Owen: Also, I believe they are willing to stipulate to the incorporation of the plaintiff.

Mr. Haight: Quite so, your Honor.

Mr. Owen: And that it is doing business in this district.

Mr. Haight: Quite so.

Mr. Owen: We offer as Plaintiff's Exhibit next in order a cut-open sample of Defendant's Type H oil seal which has stamped on it with a metal stamp, "Victor 49324."

The Court: I take it there is no objection to them.

(The sample was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Owen: And as Exhibit 2-A a sample of the same oil seal which has not been sectioned, which is still complete.

(The object was marked Plaintiff's Exhibit 2-A in evidence.) [37]

Mr. Haight: I take it, your Honor, when we do not make objection it goes in without objection we do not have to say "No objection."

The Court: Very well.

Mr. Haight: We won't be very noisy in that regard.

Mr. Owen: Mr. Johnson, would you please take the stand? [38]

LLOYD A. JOHNSON

called as a witness for the plaintiff; sworn.

Q. (By the Clerk): Will you state your name to the Court. A. Lloyd A. Johnson.

Direct Examination

By Mr. Owen:

Q. What is your full name?

A. Lloyd A. Johnson.

Q. Are you the president and general manager of the plaintiff company? A. Yes.

Q. What is the business of the plaintiff company?

A. We manufacture oil seals and shims.

Q. How long has the plaintiff company been in business? A. Since January 2, 1921.

Q. Did you start the company? A. Yes.

Q. What was its business then?

A. Manufacturing bearings, babbit bearings.

Q. When did you go into the shim business?

A. 1922—the latter part of 1922.

Q. When did you go into the oil seal business?

A. October 1930. [51]

(Testimony of Lloyd A. Johnson.)

Q. Will you describe briefly what an oil seal is in the sense in which we are using the term here, and in that connection you may refer to this chart, a photostatic enlargement, which I shall ask be marked as exhibit next in number.

(Thereupon photostatic enlargement marked Plaintiff's Exhibit No. 3.)

[Plaintiff's Exhibit No. 3 appears in Book of Exhibits.]

Q. (By Mr. Owen): Would you describe briefly what these represent so it will be clear in the record?

A. This is an electric motor with a gear reducing unit, a part of the motor. The oil seals——

Q. Would you write oil seals on there and draw lines to them so that will be clear?

A. There are four oil seals shown. On the left of the picture are shown two, between those two oil seals is annular ball bearing. To the right of the armature, or in the center of the casting is another oil seal adjacent to single row ball bearing. At the extreme right of the shaft is another oil seal. In all cases these oil seals are mounted in this machinery for the purpose of retaining the oil that lubricates these bearings. In the case of the oil seal at the right, it not only has to retain the oil seal of the bearings, but take care of any excess lubrication that comes from the gears revolving; and the same is also true of the one in the center. These gear housings usually have considerable lubricant in them to lubricate the gears, so these seals

(Testimony of Lloyd A. Johnson.)

not only seal the oil where the bearing is, but also the larger [52] volume of oil where the gear case is.

Q. Your testimony has been in connection with Exhibit 3? A. Yes.

Q. Will you also look at the photostatic broken way view which I ask be marked Exhibit 4 and describe what that mechanism is, and how the oil seals function there?

(Thereupon photostat marked Plaintiff's Exhibit No. 4.)

A. In this case the oil seals, the bearing of it looks to be like a Timken Roller Bearing. There is another sealing element in the oil seal unit which appears to be there for the purpose of excluding extraneous matter, dust, sand, and whatever may come in from the outside of this housing.

Q. What does that picture represent; what kind of a piece of machinery?

A. This appears to be the end of a shaft and is attached to a shaft housing which is attached to a toggle, like a drive shaft on an automobile or a truck.

Mr. Owen: I ask that the other broken way picture be marked Plaintiff's Exhibit No. 5.

(Picture marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Owen): Will you describe what kind of a piece of machinery that is?

A. This is a reduction gear. As the shaft enters

(Testimony of Lloyd A. Johnson.)

the right of this picture the power is carried through these gears in considerable reduction so that when the power is transmitted to this final gear, that comes out of the bottom it is at a very much reduced speed. You will find units [53] like that in trucks where they have to have compound gear reduction. These oil seals in the case of the two oil seals shown at the right, I should say the seal shown in the right is a double oil seal, and usually, where you find double oil seals you look for two sealing members so that there is considerable pressure built up, that the manufacturer doesn't care to rely just on sealing member to hold it, but has a secondary one to insure any seepage being finally held by the second member.

Q. In all cases of these oil seals what are they fitted into; what do you call that in this business?

A. They are fitted into a housing around a shaft, a rotating shaft.

Q. What other kind of machinery are oil seals used on?

A. Oil seals are used in household appliances, washing machines, mangles, electric ironers. They are very extensively used in farm machinery, tractors, disk plows, baling machines; practically every piece of modern or farm machinery uses oil seals. They are used in pumps, compressors, wherever you find bearings in modern equipment, or I should say, practically everywhere you find bearings in modern equipment you will also find oil seals.

Q. Do you keep any figures as president of the

(Testimony of Lloyd A. Johnson.)

company on the amount of business done by the oil seal industry each year?

A. We have figures, some of which are just approximate figures. We know that during the years 1944 and 1945 there were in the neighborhood of eighty million oil seals used by industry each year.

Q. Are you the patentee of the patent in suit which is marked Plaintiff's Exhibit No. 1 in this case? A. Yes.

Q. Has the plaintiff ever made and sold that device? A. Yes.

Q. The device of the patent in suit?

A. Yes.

Q. When was that?

A. I can tell you when it first came to my knowledge.

Q. You probably misunderstood my question. I asked you if the plaintiff, that means your company—— A. I beg your pardon.

Q. ——has ever made and sold?

A. No, we haven't.

Q. Why hasn't the plaintiff ever made and sold?

A. After we developed the oil seal we came into a condition that prevented us from making a sealing, because of the commercial position we found ourselves in.

Q. What was that position?

A. The Victor Gasket Manufacturing Company came out with a line of these seals and it was just a Chinese copy of our patent and we didn't care——

(Testimony of Lloyd A. Johnson.)

Mr. Haight: If the Court please, I don't suppose it will do any harm, but I don't think the witness has any right to say that.

The Court: That may go out.

Mr. Owen: You mean "the Chinese copy"?

The Court: Yes.

Q. (By Mr. Owen): Go ahead.

A. The Victor Gasket Manufacturing Company came out with a line of seals that we [55] considered to be the same as our patent and we didn't care to market an identical device, because we don't consider it good practice to go out and sell exactly the same device that is competition with us.

Q. What did you do about it when you discovered the Victor Gasket Manufacturing Company was making this seal?

A. One of the first things we did was to buy some of them.

Q. Was that before or after the patent issued, the patent in suit?

A. I think after the patent in suit issued.

Q. Do you remember what you did when you bought those seals?

A. Yes.

Q. What did you do?

A. Took them down to our plant and examined them and cut them open to see how they were made and then determined that was the type of seal we thought it was.

Q. When you cut open the seals that you bought after the patent issued, did you discover that they

(Testimony of Lloyd A. Johnson.)

were seals like these in the two photostatic enlargements?

A. Some of the seals were like the type shown as Type H and some are like Type A.

Q. From whom had you purchased those?

A. Chanslor & Lyon Company.

Q. Is that the defendant in this case?

A. Yes.

Mr. Owen: I offer as Plaintiff's Exhibit No. 6 the defendant's Type A device in suit, the enlargement thereof, and as Plaintiff's Exhibit No. 7 the defendant's Type H device in suit. [56]

(Type A device in suit marked Plaintiff's Exhibit No. 6. Type H. device in suit marked Plaintiff's Exhibit No. 7.)

[Plaintiff's Exhibits Nos. 6 and 7 appear in book of exhibits.]

Mr. Owen: Q. When you cut those seals open did you show them to me? A. Yes.

Q. That was in 1939? A. 1939.

Q. Now, going back to this point about why the plaintiff never marketed this device, I don't believe you finished your answer. I asked you what you did when you discovered that?

A. After examining these samples I wrote the Victor Company and advised them that we had this patent which is in suit and suggested that we discuss the matter, talk over the matter.

Q. Did you ever talk it over? A. Yes.

Q. With whom?

(Testimony of Lloyd A. Johnson.)

A. I talked it over with a Mr. Court Secrest, Mr. Gammie, and Mr. John Victor.

Q. Whereabouts?

A. In Chicago—at both—there were three conferences that were held. I think it is called the Illinois Athletic Club on Michigan Avenue, Chicago.

Q. Do you know about what year that was?

A. That was in 1939—April 1939.

Q. What came of that meeting or those meetings?

A. Well, the first meeting I had I discussed the question of licensing the Victor Company under this patent and I believe it was in the second meeting I suggested an alternate and that was that the Victor Company buy this patent from us and give back to National Motor Bearing Company a non-exclusive license. My [57] thought was that since Victor had gotten so well started at selling these seals I didn't see much possibility of our wanting to market them, and under the circumstances that we might avoid litigation and I felt that we might make a profit on our license to Victor or from Victor, in either case, which would in a measure offset the loss of being able to make the seals.

Q. Did Victor ever offer to buy it?

A. Yes.

Q. Was the offer satisfactory to you?

A. No.

Q. When you turned that offer down was anything said about infringement or litigation?

A. Oh, surely. I said that at the time. I told

(Testimony of Lloyd A. Johnson.)

Mr. Secrest and Mr. Victor—I very well remember using the words—that their seal was just a Chinese copy of our patent.

Q. That was in 1939, all this that you have related? A. Yes.

Q. Why was it that you waited, then, until 1944 to file suit for this infringement?

A. Well, for a time it seemed as though we might get together. I was led to believe that there was some chance of it and I thought that further negotiations might bring about a deal. Probably a year elapsed before I gave up much hope of that.

Q. Why didn't you sue them?

A. Well, England and Germany were then at war and great demands were being placed on our company to manufacture these seals for war equipment such as tanks, and aircraft guns, and all miscellaneous devices of war, and we were advised by the government our facilities were not [58] big enough to handle the expected demand for oil seals, and so we prepared to build a new plant in the East and another one in California. All of that took so much of my time and that of the other executives of the plant and we had to build up our personnel, to make a larger factory and the larger demand we just didn't have time to do it. We felt it was of a great deal more importance to make these seals for the government than it was to take out time for litigation.

Q. What decided you in September of 1944 to authorize the beginning of this suit at that time?

(Testimony of Lloyd A. Johnson.)

A. It was just about that time we were led to believe by some government agencies who were talking about cancelling contracts that the war with German was about over. That is why we felt we could go ahead without impairing our war effort.

Q. Was it necessary after that filing to get continuances because the war lasted longer?

A. Yes.

Q. Have you prepared a chart to show the two devices of the defendant? A. Yes.

Q. One is marked "Fig. 1" and the other is marked "Fig. 2"? A. Yes.

Q. And that is a duplicate of an exhibit which is attached to our bill of particulars? A. Yes.

Mr. Owen: I will offer it now as Plaintiff's Exhibit No. 8.

(Chart showing Fig 1 and Fig. 2 marked Plaintiff's [59] Exhibit No. 8.)

[Plaintiff's Exhibit No. 8 appears in book of exhibits.]

Mr. Owen: Q. Now, the drawings of the defendant's accused devices, have you made a chart of the comparative devices? A. Yes.

Q. Have you them in front of you now?

A. Yes.

Q. Where did you get the illustration on the righthand side which are marked "Patent Figure 5" and "Patent Figure 1"?

A. They are from the drawings of the patent in suit. They are just enlargements of the drawings.

(Testimony of Lloyd A. Johnson.)

Q. Photostatic enlargements? A. Yes, sir.

Q. Of the cross sections? A. Yes.

The Court: Q. They are part of the drawings?

A. That's right.

Mr. Owen: That's right, your honor.

Mr. Haight: That is what this is.

The Court: Yes; the one he has in his hand will be Exhibit No. 9.

Mr. Owen: Yes, your Honor.

(Photostatic enlargement marked Plaintiff's Exhibit No. 9.)

[Plaintiff's Exhibit No. 9 appears in book of exhibits.]

Mr. Owen: Q. Now, will you take the claim of the patent in suit and read it on the structures of the defendant?

A. An oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in the housing, comprising (a) a cup member—that is this part (indicating)—having a peripheral portion and an axially inwardly offset radial flange [60] and molded resilient member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.

Q. Do you find that structure in both the Type H and the Type A seal of the defendant?

A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. Has the seal shown by the patent in suit—
strike that. Has the oil seal put out by the defend-
ant as Type A and Type H been a commercial suc-
cess? A. Yes.

Mr. Owen: You may cross examine.

The Court: Do you wish this last exhibit ad-
mitted?

Mr. Owen: Yes, we offer that last chart in evi-
dence as Plaintiff's Exhibit No. 10.

(Chart marked Plaintiff's Exhibit No. 10.)

[Plaintiff's Exhibit No. 10 appears in book
of exhibits.]

Cross-Examination

By Mr. Haight:

Q. When did you first see on the market any-
where either of the seals, Type A or Type H?

A. I didn't hear the first part of that question.

Q. When did you first see upon the market any-
where either of the seals, Type A or Type H, to
which you have referred? A. In 1939.

Q. About what time in 1939?

A. Early in 1939.

Q. Have you any knowledge, or have you any
way of fixing the time as to how early; I am not
asking you to be too accurate, [61] but generally?

A. Yes, in relationship to a letter I wrote Mr.
Victor which was in February 1939.

Q. Type H was then on the market, was it, to
your knowledge? A. Which is Type H?

Q. One of those you testified about.

(Testimony of Lloyd A. Johnson.)

A. I don't know whether the drawing on top or bottom is that one—Type H?

Q. Yes. A. Or Type A?

Q. Type H?

A. Excuse me—if that was on the market at that time?

The Court: Q. No, he wants to know which was on first.

Mr. Haight: Q. Yes, I want to know which was on the market first.

A. As far as I know, I believe that Type A was first.

Q. And how early did you see that on the market? A. At that time, in February.

Q. When did you first see the other one on the market? A. At the same time.

Q. And where did you see those?

A. At Chanslor & Lyon Company in San Francisco.

Q. You purchased one of each?

A. Several of each.

Q. Several of each? A. Yes.

Q. And you examined them? A. Yes.

Q. What has become of them?

A. We have one of them.

Q. Did you bring it with you?

A. I believe Mr. Owen has it.

Mr. Owen: It is already in evidence, Mr. Haight. Well, [62] no, this is one which is later.

(Testimony of Lloyd A. Johnson.)

Q. (By Mr. Haight): I am advised by counsel that Plaintiff's Exhibit No. 2 is the one that was purchased later, is that correct? A. Yes.

Q. That is right, is it? A. Yes.

Q. What has become of those that you purchased early in 1939?

A. They were lost. We moved our factory in 1941 and we lost quite a box of samples at that time.

Q. When did you last see any of them?

A. I don't recall; it was sometime prior to 1941.

Q. What search did you make for them, or did you make a search?

A. I didn't make a search for them at that time.

Q. Have you since then? A. Yes.

Q. When?

A. Oh, within the last six weeks.

Q. Where did you search?

A. In our engineering department, in my office, and in the storeroom in the factory.

Q. You didn't know then that they might have been lost in 1941, did you?

A. I had a recollection that I hadn't seen them for some time.

Q. Where did you make this search?

A. This last search?

Q. Yes. A. I made it in Redwood City.

Q. At what place in Redwood City?

A. At the office of our plant.

Q. And you did not find them? A. No.

Q. Did you have any regular place where they would likely be? [63]

(Testimony of Lloyd A. Johnson.)

A. No; the point is that we not only lost these samples, but a lot of other samples that apparently became lost when we moved from Oakland to Redwood City, like some other things that were lost.

Q. Did anybody search, so far as you know?

A. Yes.

Q. Who?

A. I directed some men in the engineering department to look for them—Mr. Owen.

Q. Did Mr. Owen search, too? A. Yes.

Q. But you are familiar with the fact that those were on the market and being sold by Chanslor & Lyon, the defendant in this case, both types, early in 1939?

A. Yes, they conformed to catalogs issued at that time which I also obtained. Those pictures were in these catalogs.

Q. Now, you have never made seals corresponding to those of the patent here in suit, the company?

A. Yes, we have.

Q. When? A. In 1935.

Q. Did you sell them? A. No.

Q. Did you make them in your plant?

A. Yes.

Q. Then how extensively did you make them at that time?

A. Well, we made quite a number as we were at that time trying to develop a synthetic rubber oil seal.

Q. Did you? A. Yes.

Q. Did you market it? A. No.

(Testimony of Lloyd A. Johnson.)

Q. Did it work? A. Yes.

Q. And all of this was in 1935? A. Yes.

Q. Was your plant in condition to manufacture them at that time? A. No.

Q. What was wrong? A. We were at that time manufacturing leather oil seals and felt oil seals and we had not formulated our program for equipment.

Q. Did it require expensive equipment to make these seals? A. Very expensive.

Q. And quite different equipment from that required in making leather sealing elements?

A. Some of both kinds of equipment, new, and equipment we had on hand.

Q. The seals you were then making were wholly satisfactory? A. No.

Q. They were unsatisfactory, were they?

A. No.

Q. Well, which is it, satisfactory or unsatisfactory?

A. You asked me if they were wholly unsatisfactory, and I said no, they were not.

Q. Were they in any respect unsatisfactory?

A. Yes.

Q. In what respect?

A. Leather oil seals in certain applications would not do 100 per cent sealing jobs; applications of high speed and high temperature.

Q. Did you know of any sealing elements that would do a better sealing job at that time in 1935?

(Testimony of Lloyd A. Johnson.)

A. Not until we developed the seal I speak of.

Q. That was in 1935? A. Yes.

Q. But you didn't use the other one? You continued to use the [65] one that was inferior to that better one, is that right? A. That's right.

Q. Now, it was four years after you had a perfectly satisfactory seal that you say was made in accordance with the Johnson patent in suit before you saw these seals made by Victor Manufacturing and Gasket Company, isn't that so?

A. Approximately.

Q. You have given some reason as to why you didn't make them after you saw these on the market in 1939. Why didn't you make them from 1935 to 1939?

A. One of the reasons was that our patent hadn't issued. That took a couple of years.

Q. What difference would that make?

A. We don't care to market a product until we have it patented, if we can help it.

Q. Is that the reason you are not marketing them now? A. No.

Mr. Owen: I move that be stricken.

Q. (By Mr. Haight): Anyhow, you had, or you did nothing about it from 1935 to 1939; that is the fact, isn't it? A. No.

Q. What did you do about it?

A. We kept on experimenting.

Q. With what?

A. With these seals in question.

(Testimony of Lloyd A. Johnson.)

Q. Did you keep on experimenting after you applied for your patent?

A. Yes, kept on testing, I should say.

Q. What did you mean when you said experimenting? What experimenting was necessary after the time you applied for your patent?

A. After you create a new device, you have to find out the methods and ways that you can manufacture it economically. [66] That takes time—finding a manufacturing layout and procedures, tooling.

Q. But, in any event, during those four years from 1935 to 1939 you continued to manufacture a seal that you knew was inferior to the seal you developed in 1935; that is correct, isn't it?

A. Inferior for some applications—not every application. We still manufacture leather seals.

Q. Do you use anything other than leather in your seals? A. Yes.

Q. What? A. Synthetic rubber.

Q. Do you advertise that in any of your catalogs?

A. No, sir.

Q. You advertise only the leather, do you not?

A. That's right.

Q. And when did you first use a sealing element other than leather in any of your seals since that time you were making these in 1935?

A. 1940.

Q. What material did you then use?

A. We used a synthetic rubber compound.

Q. Did it have any name?

(Testimony of Lloyd A. Johnson.)

A. The basis of it was Neoprene; another compound, the basis of it was Hycar.

Q. Both of those are very well known materials?

A. Those two brands are.

Q. Those two brands have been known for many years, have they not?

A. Not for many years, no.

Q. As early as 1933, were they?

A. I think Neoprene came [67] out at that time.

Q. What about Hycar? A. A little later.

Q. A year or so later?

A. A couple of years, but that is only a fraction of what makes up the sealing element; that is just one ingredient out of many.

Q. What other ingredients do you use?

A. Carbon-black.

Q. What else? A. I don't know.

Q. And all of those are commonly used materials for making sealing elements, aren't they?

A. By themselves they are.

Q. You said you wrote a letter to the Victor Manufacturing and Gasket Company; when was that? A. February 17, 1939.

The Court: Counsel, may I interrupt you to inquire, is that the company that one of the counts mentions as being one of the companies that supplies Chanslor & Lyon. It has been mentioned by the witness and also there has been mentioned people connected with that, and it was not clear to me whether that was the same company. Also, you used that in your introductory statement.

(Testimony of Lloyd A. Johnson.)

Mr. Haight: That is the same company, your Honor.

Q. In respect to this meeting in Chicago you say that it was held at the Illinois Athletic Club?

A. Yes.

Q. Are you sure about that?

Mr. Owen: May I have that question, please?

The Court: He asked him if he was sure about it.

Mr. Owen: The date? [68]

Mr. Haight: No, the place.

The Witness: There were two meetings held there—there were three meetings.

Q. Where was the third one held?

A. The first one was held with Mr. Secrest, I believe it was, in the hotel I was staying at.

Q. Do you know whether Mr. Secrest is living or dead? A. He is deceased.

Q. Was Mr. Gammie present at any of these meetings? A. Yes, the second one.

Q. Where was that held?

A. The Illinois Athletic Club.

Q. When he was present, who else was present besides himself and yourself? A. Mr. Secrest.

Q. And that is all? A. Yes.

Q. At the third meeting?

A. The third meeting was held with Mr. John Victor and Mr. Secrest.

Q. Wasn't Mr. Gammie present at that meeting?

A. I don't believe so.

(Testimony of Lloyd A. Johnson.)

Q. Wasn't that meeting held at the Union League Club in Chicago?

A. I am trying to place the Union League Club.

Q. Is it on Jackson Boulevard? A. No.

Q. You said that you made an endeavor to sell this patent, did you not? A. Incidentally.

Q. Did they tell you that they had that patent examined and it had been pronounced invalid?

A. No, they intimated it, but [69] they didn't say that.

Q. You said you didn't file suit until 1944, because you were led to believe there was a chance to get together. When were you led to believe there was a chance to get together?

A. After these three meeting in Chicago I felt that the reasonableness of the position that we took and the apparent reasonableness of the Victor Company, there might still be a chance to get together and avoid litigation. [70]

Q. And when you said you were led to believe, you simply thought that; that was it, wasn't it?

A. I thought it as a result of the conversations that I had had.

Q. Did anybody say anything to you or write anything to you that led you to believe as you say?

A. Our conversations did.

Q. And your last conversation was held in the spring of 1939, was it not? A. That's right.

Q. So I will ask you again, when you said you were led to believe, that was simply your thought; nobody had said anything or done anything on

(Testimony of Lloyd A. Johnson.)

which you could found that belief, isn't that correct? A. No, it isn't.

Q. What is the fact about it, then?

A. Well, the fact of the matter is that these gentlemen from the Victory Company indicated a desire to avoid litigation, and it appeared to me that they were serious about avoiding litigation. and if we could find a meeting of common ground that they would meet me part way and I would meet them part way.

Q. Was any offer made to you to avoid litigation? A. Yes.

Q. How much?

A. \$2000. Only it was an offer to purchase the patent, which I felt would avoid litigation.

Q. And that is what they thought also, wasn't it? That is what they told you, wasn't it?

A. Well, of course——

Q. They would only buy it to avoid litigation?

A. No.

Q. What did they tell you about it?

A. We discussed the value of—let me cut that if we can. The premise on which [71] I approached the Victor Company was to this effect——

Q. Now just confine yourself to conversations and we will get along. A. I will.

Q. All right.

A. I offered to sell them the patent and retain a free non-exclusive license for National Motor Bearing Company. I felt then that—well, I also said that if they didn't care to buy the patent, I

(Testimony of Lloyd A. Johnson.)

would license them. We talked royalties. Mr. Victor asked me how much royalty I wanted, and I started off with 5 per cent. Ultimately I cut it to 2 per cent after considerable discussion. Now, those kind of negotiations are more or less commonplace in industry.

Q. But they turned you down, didn't they?

A. They turned me down on the license, yes.

Q. And everything else, didn't they?

A. No, they offered to buy the patent.

Q. For the amount you stated?

A. For \$2000.

Q. Now, you said something about having built a new plant for your company. When was that built?

A. We got into it in August, 1941, and started to build it the first of 1941, in Redwood City. In Ohio we started that plant in 1940.

Q. Can you give us any idea, without going into detail, as to the size of the Ohio plant?

A. Yes.

Q. Give us some idea very briefly.

A. It is on 10 acres of land and has about 60,000 square feet.

Q. Did you put new machinery in it?

A. Yes. [72]

Q. And about how big was the Redwood City plant?

A. At that time it wasn't in existence.

Q. In 1941 how big was it?

A. 119,000 square feet.

(Testimony of Lloyd A. Johnson.)

Q. New machinery? A. Some.

Q. When you put the new machinery in the Ohio plant would it have been difficult to put in presses and stamping machines to make the seal that you say is represented by Figs. 1 and 2—that is, seals as you say to be like the patent in suit?

A. No, it wasn't at all difficult. We did put those kind of presses in.

Q. But you didn't make that seal, did you?

A. No.

Q. But you then had the opportunity to make it, didn't you? A. Yes.

Q. No difficulty about the machinery, at all?

A. We could have put additional equipment in. This kind of seal requires additional machinery over the making of a leather seal.

Q. But you then had the opportunity to manufacture the seal of the patent, did you not?

A. Oh, yes.

Q. And you didn't?

A. We have had that opportunity all along.

Q. And you have never availed of it, have you?

A. No.

Q. No? A. It isn't good business.

Q. Now you, as I understood you, say that you find the elements of Claim 1 in the structures of the oil seals Type A and Type H. I understood you correctly, did I not? A. Yes.

Q. What is your idea of the meaning of the word "axially"? [73] A. Axially?

Q. Yes. A. Means along the axis.

(Testimony of Lloyd A. Johnson.)

Q. And in a seal like this?

A. That would be parallel.

Q. And likewise I am pointing to a representation of Type H and, for that matter, a representation of Type A. That axis would be in the same direction as the axis of a shaft on which it was mounted, wouldn't it be? A. Yes.

Q. And that would be the axis of the seal, wouldn't it?

A. Yes, it is the direction, like east is east and west is west.

Q. That's right. And if we look at this as we would look upon an ordinary map that would run east and west; that is right, isn't it? A. Yes.

Q. And radially—which way does that run?

A. North and south.

Q. North and south. Now, running southwest, wouldn't be running east and west or north and south, would it? Would it? A. It depends.

Q. Let us take in Fig. 2, Type H, that runs southwest, doesn't it?

A. It runs from north to south and from that point to southwest.

Q. That's right. And so——

A. You are speaking of the radial flange, aren't you?

Q. That's right. But at the point where the sealing element is attached it is neither radial—it isn't radial, is it, at that point, that is, north and south? A. It is radial. [74]

Q. How can it be if radial is north and south?

(Testimony of Lloyd A. Johnson.)

A. I think we are getting off on the wrong foot when we use that as an illustration.

Q. I don't think I am. A. I think you are.

Q. But running southwest, as we say, is not radial, is it?

A. Yes, the sun's rays radiate.

Q. Oh, that is the sense in which you use it: It radiates. But it isn't radial even though it radiates, is it?

A. That member is radial. In other words, that radial member starts at the periphery of the seal and comes down—draw your pencil right down.

Q. Now it is radial? A. That is radial.

Q. Now what is it? A. It is still radial.

Q. When it goes southwest it is still radial?

A. Yes.

Q. That is what you say? A. Yes.

Q. Now, when it goes southwest is it axial?

A. If it were axial in the definition of the terms used in this patent it would be parallel.

Q. So as you interpret this claim you can strike "axially" out, can't you? A. No.

Q. It doesn't mean anything?

A. Yes, it means a great deal.

Q. You can strike out "radial"; that doesn't mean anything, does it? A. Yes, it does.

Q. It means that it is radial, doesn't it, and axial means that it is axial, and you say that axial means that it is not [75] axial and radial means that it is not radial?

A. Radial isn't an axial direction.

(Testimony of Lloyd A. Johnson.)

Q. Will you explain that, "radial in an axial direction"? One is north and south and the other is east and west.

A. I will try to give it as I read the claim, if you want me to.

Q. I am reading the claim correctly, I think, and I am reading to you the words "axially inwardly offset radial"—

A. You start with a radial flange.

Q. All right.

A. That is this portion (indicating).

Q. All right.

A. The radial flange is this portion of the seal.

Q. All right. Then what is it after that?

Mr. Owen: Would you mark that with an "x," Mr. Johnson? You are marking that on Exhibit 10?

A. 10 (marking on exhibit).

Q. (By Mr. Haight): All right. The part that you have marked with a pencil cross with a lead line to the grey portion of the cut, that is radial?

A. Yes.

Q. Now, it changes its direction, does it not?

A. It is a flange.

Q. The flange changes its direction, does it not?

A. Yes.

Q. And when it changes its direction is it still radial at the point where it changes its direction? I think you can answer that "Yes" or "No."

A. Yes.

Q. It is still radial?

A. Yes. [76]

(Testimony of Lloyd A. Johnson.)

Q. Now, is there any part of that flange represented in Plaintiff's Exhibit 10 that is axial?

A. Any part of the flange?

Q. Yes, sir. A. Yes.

Q. Which part?

A. The point at which the sealing member rests on the shaft (indicating).

Q. You are now pointing to the sealing element which is represented here in pink, is that right?

A. That's right.

Q. That is axial? A. Yes.

Q. But the flange is not axial, is it not?

A. That is a flange. It is a sealing flange.

Q. So you arrive at that by forgetting about the flange adding the sealing element to it; that is what you think this patent means, is it? A. No.

Q. What does it mean when it says it is radial and it is axial?

A. As I have always interpreted this patent, it is made up of a cup member. Part of this cup member is called the periphery.

Q. That is the upper part?

A. That is the outer part is the periphery.

Q. That part is axial, too, isn't it?

A. Correct.

Q. All right.

A. Then when that cup turns to make the bottom, it is radial.

Q. Right. A. Unquestionably.

Q. Yes, sir, we agree.

(Testimony of Lloyd A. Johnson.)

A. To what degree the inturned axial [77] part is radial is the question you are asking me?

Q. I am not asking you about degrees; I am asking you if it is either radial or axial.

A. Axial in its direction.

Q. That is right. And so is radial, isn't it?

A. What is that?

Q. Radial relates to direction also, doesn't it?

A. Yes.

Q. And now will you just look at your claim again and see if you can make an answer to this one: As you interpret it, doesn't the claim mean exactly the same if you strike both "axially" and "radial" out of it and simply read it "An inwardly offset flange?" You don't find any difference between what I have just read and what the claim says, do you? I want to be sure that I get your answers.

A. I want to be sure I understand your question.

Q. All right, I want you to. Let's try again and see if you do understand.

A. Which words do you want me to cut out?

Q. I want you to cut out "axially" and I want you to cut out "radial."

A. To cut out "radial" the thing wouldn't make sense.

Q. All right. That is the best answer you can give to that. How about "axially?"

A. "Axial" is descriptive.

Q. Of what?

A. Of the position the radial flange takes.

(Testimony of Lloyd A. Johnson.)

Q. All right. And that is parallel to the axis, isn't it? That is east and west?

A. That is in that direction.

Q. Aren't you going to stick to the east and west? [78] A. Oh, no.

Q. You aren't going to? Oh, well—now, there is a clause in that claim at the end, "Whereby said molded material is protected from wear by contact with adjacent moving parts." How do you interpret that?

A. I interpret it to mean the molded material relating to the sealing flange——

Q. Yes.

A. (Continuing): "is protected from wear by contact with the adjacent moving parts. In other words, the heel of the cup, the bottom of the cup protects gears that might revolve next to it from catching the sealing member.

Q. Now, the only adjacent moving parts there would be the shaft, wouldn't it?

A. No, it could be a gear on a shaft and it could be a bearing.

Q. As you look at——

A. It could be a slinger; it could be anything that would be an adjacent part.

Q. Now, I have an oil seal in my hand. When you talk about adjacent moving parts, will you state where, in your judgment, in respect to that claim, such an adjacent moving part would be in reference to an oil seal such as I hand you?

A. Where the heel of this sealing member is

(Testimony of Lloyd A. Johnson.)

where it is protected by the bottom of the cup, or this radial flange can be so installed that it is mounted adjacent a revolving gear or some other device.

Q. Well, if it were mounted so adjacent to the gear that they were in collision metal-to-metal, there would be some wear [79] somewhere, wouldn't there?

A. The answer to that is that in many applications the oil seal is used for a spacer as well as an oil seal.

Q. But until it is in such a position there is no protection required, is there?

A. It doesn't happen in every application.

Q. What is that?

A. It doesn't happen in every application.

Q. It doesn't happen in most applications, does it?

A. The majority of them, I would say, 51 per cent, it doesn't.

Q. Do you know now of any place where the defendants in this case have mounted a seal in that manner?

A. I don't know where the defendants have ever mounted a seal.

Q. But you don't know that they have ever thus mounted a seal, do you? A. No.

Q. And particularly you don't know that they have ever so mounted a Type H or Type A seal?

A. I don't know what they do other than sell the seals.

(Testimony of Lloyd A. Johnson.)

The Court: We will take a recess at this time.

(Recess.)

Mr. Haight: Mr. Johnson——

Mr. Owen: May I just interrupt, your Honor, one minute? I have a witness under subpoena to be here at three, thinking that we would be ready for him. It is agreeable to him to come back in the morning at ten. Would it be all right if the court so instructs him? [80]

Mr. Haight: Yes, it is all right with us.

Mr. Owen: Then we won't interrupt Mr. Johnson's cross-examination.

The Court: You may just tell him to return at ten.

The Court: I am sorry this naturalization matter took longer than I thought. I thought it was more or less of a formal matter, else I would not have taken it up at three o'clock.

Mr. Haight: Mr. Johnson——

The Witness: May I interrupt to say that one of the questions you asked me, I answered incorrectly.

Q. Yes. A. Technically.

Q. Which one was that?

A. You asked me when I first was aware of this infringing seal, and I told you 1939, as I recall it. I should have said 1937. Now, I don't——

Q. Now, you and I won't quarrel about "infringing seal," but what you are referring to are the devices Type A and H, is that right?

A. That's right. I was answering your question

(Testimony of Lloyd A. Johnson.)

on the basis of seeing the seal, but I knew about it before that.

Q. That is all right. Thank you. Now, referring to the seal that is depicted in the Johnson patent in suit, such a structure is adapted for use either on a rotating or reciprocating shaft, is it not?

A. Yes.

Q. And that is generally true of these oil seals, isn't it? [81] In the main, isn't that true?

A. The degrees are involved in that. A seal might be all right for a reciprocating shaft in one application, and not in another.

Mr. Haight: Very well. Will the reporter mark this document Defendant's Exhibit GG For Identification?

Mr. Owen: I would just as soon have that offered as our exhibit. I was going to put it in later.

The Clerk: We mark these in order. May we mark it A?

Mr. Owen: Why don't we just mark it Plaintiff's Exhibit 11?

Mr. Haight: I don't know what your practice is in that regard. We have marked our deposition exhibits with letters and we have reached FF. Is it your custom to begin here——

The Court: Well, are you going to offer the exhibits in the deposition?

Mr. Haight: Yes.

The Court: In the same order that you have them in the deposition?

Mr. Haight: Yes.

(Testimony of Lloyd A. Johnson.)

The Court: And it would be more convenient then to keep the same numbers?

Mr. Haight: Yes.

The Court: Now you have an additional exhibit?

Mr. Haight: Here is an exhibit I would like to have identified to interrogate this witness about now.

Mr. Owen: It was an exhibit I was going to offer. I would just as soon offer it now. It will be Plaintiff's Exhibit [82] 11.

Mr. Haight: All right; offer it.

The Court: Let it be marked Plaintiff's Exhibit 11.

Mr. Haight: O.K.; it serves the same end.

(The document was marked Plaintiff's Exhibit 11 in evidence.)

The Court: Is that it (indicating)?

Mr. Haight: I think that is it.

The Court: Is that it?

Mr. Haight: Yes, it is the outside of that I am going to refer to now.

Q. Mr. Johnson, I am showing you what appears to be a cover of a catalog marked Plaintiff's Exhibit 11. It appears to have been copyrighted in 1934. Are you familiar with that document?

A. Yes.

Q. Is that put out by your company?

A. Yes.

Q. In 1934?

A. Where do you find the date?

Q. Way down here (indicating).

(Testimony of Lloyd A. Johnson.)

A. Well, that is the—that doesn't mean that this catalog was put out in 1934; it means the copyright was acquired in 1934.

Q. Well, do you know when this catalog was put out?

A. I would have to look it up to answer that.

Q. Wasn't the copyright upon the catalog? Isn't that what the copyright date refers to?

A. I think it refers to the design seal and "National," as I recall it. I think that catalog [83] was put out in 1940; somewhere along there, 1939 or '40.

Q. How could you determine when it was put out?

A. I can ask one of the men here in the courtroom.

Mr. Haight: Will your Honor permit that?

The Court: I beg your pardon?

Mr. Haight: He wants to ask one of the men in the courtroom who can give us the date. Is that all right?

The Court: It is all right with the court.

Q. (By Mr. Haight): Will you please do so?

The Witness: Mr. Wray, when was this catalog published?

Mr. Ray: I believe in 1940.

Mr. Haight: Very well. Thank you very much.

Q. Now, will you look at the structure that is represented on the outside cover? Are you familiar with that? A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. How is that sealing element attached to the flange of the cup?

A. How is it attached to the flange?

Mr. Owen: If your Honor please, I believe this is going beyond the cross-examination of the opening case and going into other structures than the witness went into on the opening.

Mr. Haight: I think that is quite true, that it is going into other structures.

Mr. Owen: In other words, it is for the rebuttal case rather than at this point.

Mr. Haight: He appeared as a patent expert and interpreted the claim in response to your questions. [84]

Mr. Owen: That is all right, but we didn't go into any of the other art.

The Court: Well, he may by way of cross-examination, testing some of the answers that were given by another similar form of device.

Mr. Owen: I have no objection to that.

The Court: I think it would be properly within the realm of cross-examination.

Mr. Owen: I have no objection to that.

Mr. Haight: I think I shall stay within those bounds, your Honor.

Q. Is the flange radial in that construction?

A. What do you mean by the flange—the flange of the cup?

Q. Yes. A. Yes.

Q. And is this other member immediately beside it also radial? A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. And how is that secured between the two members? A. By compression.

Q. Any other means? A. No—no.

Q. What is the function of that little protuberance that I see in the cross section?

A. We call that a dink. There might be six or so of them around the outside shell.

Q. And that is merely held there by compression? A. That's right.

Q. It works all right, does it?

A. In that type of seal. [85]

Q. And what is the sealing element made of? Is that leather?

A. The picture indicates leather?

Q. Molded. It is a molded material?

A. It is molded in a press, yes.

Mr. Haight: That is all, if your Honor please.

Redirect Examination

By Mr. Owen:

Q. The Mr. John Victor to whom you referred several times holds what office in the Victor Manufacturing Gasket Company, do you know?

A. My understanding is he is president of the company.

Q. Now, referring to the chart Exhibit 10, Mr. Haight was asking you about the words "axially" and "radial," on that element which reads: "A cup member having a peripheral portion and an axially inwardly offset radial flange." Now, there is no weight given in his question to the words

(Testimony of Lloyd A. Johnson.)

“inwardly” and “offset.” Now, I wish you would take this Exhibit 9, the comparison chart, and as I read these words on that element would you point out on the patent in suit, that is Figs. 1 and 5, representing the patent in suit, what that element applies to? Now, the cup member. What are you pointing to now?

A. I am pointing to the periphery of the cup.

Q. I am talking about the cup member. This is the first element, a cup member. What is that colored on that chart Exhibit 9? A. Blue.

Q. And what is its shape?

A. Well, the shape of the seal is [86] round and it represents a cross section of the seal.

Q. All right. Then it says, “A cup member having a peripheral portion.”

A. That is this portion I have just been pointing to.

Q. Will you draw a line up from that and put the letter “Y”?

(Witness draws on exhibit.)

Q. Now, it says, “An axially inwardly offset radial flange.” Will you point that out in Fig. 5 of the patent? A. That is this portion.

Q. Which portion is that?

A. Right below the periphery where it starts to bend inwardly. This portion (indicating).

Q. Now, the “axially inwardly offset radial flange”—that is which portion—the portion that

(Testimony of Lloyd A. Johnson.)

lies, as I understand it, below this periphery portion? A. Yes.

Q. Is it all that portion that lies below the periphery portion? A. Yes.

Q. Is that right? Now, taking the defendant's device, which is shown there as Type H, will you apply these words, "A cup member having a peripheral portion"? Do you find that there?

A. Yes.

Q. And do you find an "axially inwardly offset radial flange"? A. Yes.

Q. In other words, a radial flange with an axial inward offset? A. That's right.

Q. Is that there? A. That is there. [87]

Q. Will you look at Fig. 1 of the patent drawings reproduced on this chart, Exhibit 9, and tell me if you find a cup member there? A. Yes.

Q. Is that colored blue? A. Yes.

Q. Do you find a periphery portion for it?

A. Yes.

Q. Will you mark that?

(Witness marked on the exhibit.)

Q. Now, do you find an axially inwardly offset radial flange? A. Yes.

Q. What does the word "inwardly" refer to in that element?

A. It means that the radial flange is bent in a plane which is inside the seal. This being a cross section, it means that what we would ordinarily

(Testimony of Lloyd A. Johnson.)

term the bottom of the seal or the radial flange is pushed inside the seal.

The Court: Is this a cross section?

Mr. Owen: That is a cross section only of the Type H, your Honor.

The Court: I mean when you are using the term "cross section" you are referring to the view of the seal as shown in this Exhibit No. 2?

Mr. Owen: Exactly, your Honor.

Q. Now do you find in the defendant's Type A seal a cup member having a peripheral portion?

A. Yes.

Q. Will you mark that "Y" on Exhibit 9?

A. I didn't mark the one above that. [88]

Q. Will you also mark it on the one above about which you testified earlier with the letter "Y"?

(The witness marks on the exhibit.)

Q. Now, do you find there that cup member having also an axially inwardly offset radial flange?

A. Yes.

Q. In other words, the radial flange is inwardly offset, is that it? A. That's right.

Q. Is that present there?

A. Yes, it is present in all of them.

Q. Then in the questions that were asked by Mr. Haight and your answers where he was confining all your attention to the words "axially" and "radial," were you taking into account the words "inwardly" and "offset" which are also

(Testimony of Lloyd A. Johnson.)

modifying words, or is the word "inwardly" to be read also with the word "axially" in that element?

A. Yes, the word "inwardly" is describing——

Q. What does it modify?

A. Radial flange that is inwardly offset. To describe "inwardly," the word "axially" indicates the direction in which the inwardly offset goes.

Q. So that I am clear on what your answer is, what that language then means to you is the cup members having a radial flange with an axially inwardly offset, is that correct?

A. That's right.

Mr. Owen: That is all.

Recross-Examination

By Mr. Haight:

Q. Mr. Johnson, on your redirect examination you said that in that phrase that has been discussed, "inwardly" [89] and "offset" were also modifying words. Is "axially" a modifying word?

A. Descriptive.

Q. And is "radial" a modifying word?

A. It is descriptive.

Q. To be sure that I understand what you mean by "descriptive" as related to modifying, is "inwardly" a descriptive word? A. Yes.

Q. And is "offset" a descriptive word?

A. Yes.

Q. The four of them are descriptive words, are they not? A. That's right.

Q. Now, on cross-examination I think you told

(Testimony of Lloyd A. Johnson.)

me that you found the axial part of the flange in the sealing element, itself, did you not?

A. I spoke of the axial part of the sealing flange.

Q. But you found the axial part of the sealing flange, did you not? A. Of the sealing flange.

Q. That is what you called it; that was the axial part of the sealing flange?

A. That is what I said.

Mr. Haight: That is all.

Further Redirect Examination

By Mr. Owen:

Q. Mr. Johnson, I didn't so understand your testimony and I want to be sure we are clear on this point: In the patent in suit you use the words "a cup member having a peripheral portion and an axially inwardly offset radial flange." That is at the foot of this structure Fig. 1, isn't it?

A. That is right. [90]

Q. And since the defendant's Type A structure is substantially the same shape as Fig. 1 in the patent, that would also describe it, would it not?

A. Yes.

Q. Then was Mr. Haight correct, or in error, or am I in error, in understanding that you were applying the words "axially inwardly offset radial" to the sealing member, itself? A. No.

Q. You weren't so applying them?

A. No, I was using the word "axially" when I was discussing the sealing element, itself.

(Testimony of Lloyd A. Johnson.)

Q. My understanding was that you used the word "axially" as giving him an illustration of something that was axially trended.

A. That is what I was trying to do.

Q. Referring to the sealing member, is that right?

A. I was using the sealing member, itself, as an illustration of what "axially" meant.

Q. Apart from its use in this element?

A. That's right. I was saying that this portion of the sealing member was axially placed here. This is the axis along the shaft.

The Court: May I ask a question of the witness without offense to counsel?

Mr. Owen: Any time, your Honor.

The Court: This that you have marked "X" is the flange?

A. The radial flange.

Q. Never mind about radial. Is it a flange?

A. Yes.

Q. Now, in the claim the words "axially" and "inwardly," I take [91] it, are adverbs, aren't they?

A. Yes.

Q. And the terms "offset" and "radial" are adjectives; in other words, to read that correctly—and if I am incorrect, why, you explain it to me—that means a radial flange that is offset both axially and inwardly?

A. That is correct.

Q. And is that what you are intending to say?

A. That is what I am trying to get over; that is what I claim the patent is.

Mr. Owen: That is correct.

(Testimony of Lloyd A. Johnson.)

The Court: I guess people that write these things are worse than the judges when they write some of the decisions.

Mr. Owen: I wrote this, your Honor, so I am guilty.

The Court: May I ask another question of either counsel or the witness, so that we can get this clear? Without regard to the merits of this controversy, I am asking this question so that I can relate some of this testimony to what I comprehend to be the type of thing that is involved here: Is this Exhibit 2-A—I say aside from the merits of this controversy—what you call an oil seal?

Mr. Owen: That is correct, your Honor.

The Court: Now, this is adjustable onto a—
A. Shaft.

Mr. Owen: The witness, I think, can describe exactly how that goes in.

The Court: That is what I want him to do. [92]

The Witness: If you will allow me to stand here.

The Court: Yes. Would counsel object to this?

Mr. Haight: Oh, no, not at all; not at all.

The Witness: If I may take this out, I can show you better.

The Court: All right.

A. This represents—this diameter represents the part that goes on the shaft. Here is a typical shaft.

Q. Well, this is a shaft, and then the oil seal goes onto it, is that it? A. That is right.

Q. And a number of them are used on a shaft?

A. Wherever required.

(Testimony of Lloyd A. Johnson.)

Q. Wherever required?

A. That's right. When this goes on the shaft the usual thing is that the shaft is a little bigger.

Q. That is the purpose of the spring inside?

A. That is the purpose of the spring—like a garter, if you wear garters around your leg.

The Court: That is what I want to know. I wanted to be sure.

Mr. Owen: There is just one other thing I would like to clear up while we are on this point, and that is that this oil seal is slipped on the end of the shaft in Exhibit 5 and into that bore—you see that bore there that has received this seal?

The Court: Does any of the oil get inside of this? A. Yes, it does. [93]

Q. Through this opening, here?

Mr. Owen: Show the Court about that, Mr. Johnson.

A. If I can show you, Judge, on the one that you are looking at—

Mr. Owen: Plaintiff's Exhibit 2.

The Court: 2-A, is it not?

Mr. Owen: That is right.

The Witness: This is called a wiping lip, this part. This faces the lubricant to be sealed. In this case on this Exhibit 5 there is the wiping lip of the seal.

Mr. Owen: Will you just draw a line to that and write "Wiping lip" off from it?

The Court: I may be anticipating what is going

(Testimony of Lloyd A. Johnson.)

to be shown but I wanted to be able just as I have heard this testimony to relate it to the seal.

The Witness: This part we are always talking about is the periphery.

Mr. Owen: The witness is pointing to the outer cylindrical ace of the seal.

The Witness: That portion of the seal, the outside diameter of it, is a little bigger than the hole it fits in so that when it is pushed into the housing, into that hole, the pressure of the press fit holds it in place. [94]

(Thereupon an adjournment was taken until tomorrow, Thursday, January 24, 1946, at ten o'clock a.m.)

Thursday, January 24, 1946, 10:00 o'Clock a.m.

Mr. Owen: Mr. Johnson, will you please take the stand? If your Honor please, I would like to recall Mr. Johnson. He has brought in a further sample of how oil seals are used. I think it may be helpful to the Court.

LLOYD A. JOHNSON

recalled.

Direct Examination

By Mr. Owen:

Q. Mr. Johnson, did you bring in a further illustration of how oil seals are used, and will you

(Testimony of Lloyd A. Johnson.)

explain what you have and what each part represents, and show the court how it is used?

A. I have a seal ring which represents an opening in a housing, the environment in which the seal is inserted has such an opening.

Q. With a ring for this member that is bolted on to the left-hand end of Exhibit 3? A. Yes.

Q. It is equivalent to that?

A. It is equivalent to that. Then I also have a piece of steel which would represent the shaft or a particular piece which would be attachable to the shaft on which the seal operates. Then I have a seal which [97] is attachable, or seals, and I can explain how the seals are mounted and how they operate, with these three pieces, and taking this ring which represents the hole in the housing in which the seal is placed.

Q. That is the larger ring?

A. That is the larger seal ring. The seal is mounted in that housing with the wiping lip of the seal toward the oil that is to be sealed, it is placed in, started in, and then pressed into that housing.

Q. This one actually does not go in, because you do not have the machinery to push it the rest of the way in?

A. It is relieved a little bit, just to allow it to enter, but ordinarily a tool is used to press the seal in the housing, the seal being a little bit bigger than the hole in the housing.

Q. Does that make a tight fit between the seal housing and the bore of the housing?

(Testimony of Lloyd A. Johnson.)

A. Yes, it does, the periphery pressing the seal into the housing makes the outside periphery of the seal move against the inside of the wall of the housing so that there is a tight fit, and the oil cannot seep out on the outside of the seal.

The Court: It prevents the oil from passing out of the lip?

A. No, not at that point, only when the shaft is in place. Now, we put the shaft in.

Q. (By Mr. Owen): That is the smaller of these three elements you have?

A. Yes. The oil is placed on my left-hand side. The oil cannot go out through these holes because it is plugged up with the seal, the shaft being a revolving shaft, turning like this, sometimes at high speed, sometimes at low speed, the oil is prevented from going through because of this sealing flange, sealing material. There is this spring in back of that like a garter that presses on the sealing material around that entire circumference of the flange that prevents the oil from going through. Now, the seal interior is important for the reason that the oil in the back of the wiping lip of the flange creeps up and around the flange if there is any kind of an opening, a very minute opening, so therefore the flange has to be anchored in the interior of the seal, just as carefully as the seal, itself, has to be pressed into the housing so that there cannot be a leak between the sealing member and the seal, and the metal part of the seal. This is a

(Testimony of Lloyd A. Johnson.)

very important point in the manufacture of a seal.

Mr. Owen: I should like to offer these three parts of Plaintiff's Exhibit 12 and ask that the clerk place a string through the hole in the smaller element and around the three parts so that they cannot be separated, and will be kept in relation for future assembly.

(The three parts are marked Plaintiff's Exhibit 12.)

Q. Mr. Johnson, did you also bring this morning the rest of the section of the seal Exhibit 2 which was cut out when that seal was sectioned?

A. Yes. [99]

Q. Have you torn away part of the sealing element on that small section to show how it is bonded to both sides of the sealing member?

A. Yes.

Mr. Owen: That pulls away. If you take hold of the loose end it will pull away. That is a segment out of this exhibit. I offer that segment as Plaintiff's Exhibit 2-B.

(The segment out of the exhibit is marked Plaintiff's Exhibit 2-B in evidence.)

Mr. Owen: That is all.

Mr. Haight: That is all.

Mr. Owen: Will you take the stand, Mr. Lyon?

PHILIP H. LYON

called as a witness for plaintiff; sworn.

The Clerk: Will you state your name to the Court?
A. Philip H. Lyon.

Direct Examination

By Mr. Owen:

Q. Mr. Lyon, what is your business?

A. President of Chanslor & Lyon Company.

Q. Are you here under subpoena? A. Yes.

Q. Is Chanslor & Lyon Company the defendant in this case? A. Yes.

Q. How many stores does Chanslor & Lyon Company have? A. Sixteen.

Q. Whereabouts are they located?

A. In California.

Q. About how many customers have you?

A. 9,000 or 10,000. [100]

Q. What is the general nature of the line of merchandise you folks handle?

A. Automobile merchandise of all kinds.

Q. Is the defense in this case being conducted by the Chanslor & Lyon Company?

Mr. Boyken: Now, if your Honor please, I want to object to that question. I think it is immaterial to the issues in this case who is conducting the defense. There is only one defendant, and that is Chanslor & Lyon Company. There is a simple complaint and the only issue tendered by the complaint is whether the patent is a valid patent and whether it is infringed, and any question as to who is conducting the defense or who is paying for the defense

(Testimony of Philip H. Lyon.)

is entirely irrelevant and immaterial to the issues as tendered in this case.

The Court: I think I rendered a decision on that point.

Mr. Owen: Yes.

The Court: I had that point up.

Mr. Owen: You had it in Hydraulic Press Manufacturing Company v. Brodie Company. In that case your Honor said, "One further matter requires comment." I am reading now from Hydraulic Press Manufacturing Company v. Ralph N. Brodie Company, that is reported in 59 U. S. Patents Quarterly at page 268. The court said:

"One further matter requires comment. The Baldwin Locomotive Works by admission of counsel in open court was stated to be defending this case; hence the Baldwin [101] Locomotive Works should be and I find it to be estopped by the decision herein."

Then it cites Goodman v. Super Mold Corporation of California, 103 Fed. (2d) 474, and B. F. Sturtevant Co. v. Clarage Fan Co., 50 Fed. Supp. 157.

The Court: The only effect of that rule of law, as I recall it—it has been sometime since I studied that point—was that if it appeared that any other party except the defendant was defending a case that the court could hold in the decision that that party is estopped by this decision, not that there is any judgment given against him, but if he has come in and assumed the burden of defending, and it so

(Testimony of Philip H. Lyon.)

appears, he may be held to be estopped by the decision.

Mr. Owen: That is it.

Mr. Boyken: The rule is a little different. I would like to give the court my understanding. In this case there is only one defendant, and it is entirely irrelevant whether that defendant himself is paying for the defense, or conducting it, or what-not. It might be important in some other later case if the plaintiff is successful here and decides to sue some other company, or the Victory Company in this case in another jurisdiction, and then in that second case it could be ascertained whether or not the Victor Company participated in the defense here and was bound by the decision of this court; but that could only come out in that second case, because it [102] might be *res adjudicata* in that case. It is immaterial in this case here who is defending it, but if the plaintiff is successful then perhaps in that second case against the manufacturer it could be ascertained who actually defended the suit here.

Now, I think that is pretty well established. Counsel has mentioned one case, but that is a case I think where there was more than one defendant; as I recall the Brodie case there was more than one defendant. There are many authorities, and I have two. One was decided by the District Court in the Southern District of New York, and that is the case of *Lip Lure, Inc. v. Bloomingdale Bros.*, 27 Fed. Supp. 811.

(Testimony of Philip H. Lyon.)

In that case plaintiff made a motion that was similar to this situation here. Plaintiff made a motion to examine defendants and to compel them to produce and permit inspection of certain documents, and the object was to find out who was defending that suit.

Judge Conger in his opinion, and I only want to read a paragraph or two, on page 811 says this:

“The plaintiff’s contention is that this inspection is sought to ascertain the facts and to find out whether or not the activities of Princess Pat, Ltd., in defending this suit, are of a sufficient degree that the judgment of this court will be binding against it and if the judgment is binding against Princess Pat, Ltd. the plaintiff will [103] have the right to invoke in a subsequent suit between it and Princess Pat, Ltd. the doctrine of estoppel as *res adjudicata*, to the end that the judgment in this action is binding against Princess Pat, Ltd.”

I pause there. That seems to be the situation here. Then the Judge continues?

“I cannot agree with the plaintiff that this is an issue involved in this action. There is no question but that no judgment can be entered against Princess Pat, Ltd. in this action, even though they defend herein, but the fact that they do defend will be relevant in a future action, if judgment is rendered herein in favor of the plaintiff.”

(Testimony of Philip H. Lyon.)

Now, that is my contention here, that in some future action, if the plaintiff is successful against the Victor Company, then it is material to find out whether the Victor Company is bound, but it is not material at this time in this action.

Now, the other authority I have is to the same effect, and that is the case of *Prosperity Company v. St. Joe Machines*, and that is found in 2 Fed. Rules Decisions at page 299. There again the circumstances were similar to those here. Let me just read a paragraph of that case. It was a decision in the District Court for the Western District of Michigan, and Judge Raymond says: [104]

“Plaintiff’s first motion is for an order to compel defendants to answer questions propounded to certain witnesses upon the taking of depositions, which questions the witnesses refused to answer on advice of counsel for defendants. The witnesses were officers or employees of defendants. The questions were obviously directed to the purpose of learning who, if anyone, aside from the named defendants, is financing or directing the defense. Aside from the matter of privilege, the only restriction placed upon evidence which may be obtained upon discovery examinations is that it must be relevant to the issues in the pending case. Careful consideration of the case of *Lip Lure, Inc., v. Bloomingdale Bros.* and of the reasoning upon which it is based convinces the court that it is controlling here.”

(Testimony of Philip H. Lyon.)

In other words, this court in Michigan followed the New York Court and held that in the main case the question as to who is defending or conducting the case is immaterial.

That has been followed out here, too. I had a suit before Judge Harrison in Los Angeles about four or five months ago, and his opinion is unreported, though I could supply it, when the same question came up, as to whether or not it is important in the first suit to find out whether the manufacturer or the user was defending it, and Judge Harrison ruled it was immaterial in that case who was defending the suit. I think that is far the better view, and if your Honor has held otherwise [105] in some case——

The Court: That question in the other case did not arise at all by virtue of objection to the introduction of testimony. It appeared without dispute. The attorneys said the locomotive company, having sold this person in Oakland or San Francisco, it was defending the case, so there was not any question about it. In view of my examination of the other decisions along that line I stated in the decision it did not arise.

Mr. Boyken: I suppose, under those circumstances, it was quite proper, but there were other defendants, it seems to me, in that case, they were Eastern defendants, and they remained defendants in the suit. It may be that your Honor thought they voluntarily appeared, and maybe they did, but that is not the situation here.

(Testimony of Philip H. Lyon.)

Mr. Owen: Might I cite my law? I have not done so.

The Court: All right.

Mr. Owen: I might say that the two cases Mr. Boyken read from were motions; one was a motion for inspection and the other was on deposition.

In the Circuit Court of Appeals in the case of *Hy-Lo Unit & Metal Products Co. v. Remote C. Manufacturing Company*, 83 Fed. (2d), 345, Judge Wilbur reviews the difference between court cases and concludes by saying: "Consequently, it was held erroneous to exclude evidence of an agreement between the two companies to conduct a joint defense of the action [106] brought against the American Smelting & Refining Company."

Now, he reviews the law there and he says:

"These decisions by the Supreme Court establish the proposition that, in order for a person not formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense."

Then he reviews the facts in that particular case.

Then in the *Universal Oil Products Co. v. Winkler-Koch E. Co.*, 27 Fed. Supp. 161, page 167—and this, by the way, was a case in the District Court in the Northern District of Illinois, where if we are successful in this case we would bring suit against

(Testimony of Philip H. Lyon.)

the Victor Company to enforce these issues of validity and infringement which would be determined here.

The Court says, after reviewing the law:

“In my opinion good faith requires parties participating in and controlling a case, but who are not parties of record, to disclose to the court the fact of such participation, and failing to do so, such parties are not in a position to avoid the effect of the judgment as a bar, on the ground that there is lack of mutuality of estoppel, if the opposing party subsequently learns of their participation.”

Now, where the parties knew, as they do here, who was [107] actually defending the case, and where the manufacturer is in the case, there is certainly no harm to have that matter shown in the record. It helps later on; when we get into Illinois we would bring Mr. Lyon from here to Illinois to testify, or come out and take his deposition, whereas if it was testified to here it is clear and there is no question about it.

In the case of *Caterpillar Tractor Company v. International Harvester Company*, 32 Fed. Supp. 304—this was in New Jersey—your Honor will recall that International Harvester’s dealer was in Nevada. Judge Norcross tried the case and held the patent valid and infringed; on appeal the Circuit Court of Appeals held most of them valid and infringed and reversed the lower court as to a few, and then Caterpillar went into Delaware——

(Testimony of Philip H. Lyon.)

The Court: Let me interrupt this argument; these cases that have been cited more than likely refer to cases where there was no need arising to ascertain who was defending the case in the primary case, and hence it was not questioned, because of that situation, but what harm could there come if the fact is the manufacturer is defending the case, of having it disclosed to the court when an inquiry is directed to that specific fact in the trial of the case. Now, should the court close his eyes and say, "I won't listen to that now," if there is another suit that will have to be proved in another suit, when if there is no question about it it might be determined [108] right here. It does not seem to me that that is equitable. I am wondering whether in those two cases the issue arose at a time when it was conceded for certain purposes during the trial of the case either by stipulation or by questioning of the witness.

Mr. Boyken: Those two cases from which I read are cases which your Honor has termed primary cases, they are not the last cases on the subject. They are the first cases in both instances, and the court held, and I think that is a proper rule, if I may say so, that the trial should be limited to the issues that are tendered by the complaint and by the answer. Now, in this case there is nothing said in the complaint about who is defending the case or anything of that kind. It merely says that these seals were manufactured by the Victor Company

(Testimony of Philip H. Lyon.)

and sold by Chanslor & Lyon. I have represented Chanslor & Lyon in the past for many years.

The Court: Aren't we wasting a lot of time on something that is rather hypertechnical? I suppose in my practice this is the second time I have met this question. What possible advantage could either side gain one way or the other, or what possible disadvantage could there be to you on the other side of the case if that is the fact. Unless there is some substantial right violated, if it really would be something prejudicial to the case of the defendant I do not see what harm can come from it; it is not going to make any difference [109] to me who is defending the action, all I am going to do is to decide whether the patent is invalid or whether it is infringed, and if they get more astute lawyers than they have out here from the Eastern part of the United States, I am only going to decide the case on the question of infringement and the invalidity I do not think it is worth wasting time over this matter.

Mr. Boyken: I can't tell you all of the reasons why we interpose this objection to the question and this line of testimony. There probably may be very good reasons, but your Honor cannot get away from this proposition, that the only issue before this court is the validity of this patent and infringement of the patent, and there is no reason shown for going outside of the issues as tendered by the pleadings in this case; there is no reason shown for it right now; that might arise later, but not now.

(Testimony of Philip H. Lyon.)

The Court: If I should decide the case in favor of the defendant then I will strike that evidence from the record.

Mr. Owen: No, they will want it in then.

The Court: I will allow the testimony. I will overrule the objection, and you may make a motion to strike when you submit the case, and if I do not consider it material I will strike it out.

Mr. Boyken: May my objection go to the entire line of the testimony in addition to this particular question?

The Court: Yes. [110]

Mr. Boyken: May my objection go to the entire line of the testimony in addition to this particular question?

The Court: Yes.

Mr. Owen: Will you read the question?

(Question read by the reporter.)

A. Counsel is out there. We did not employ the counsel. Is that the answer you want?

Q. Yes, that is all right. Who employed the counsel, do you know?

A. I presume the Victor Company; in fact, I am sure of it.

Q. The Victor Manufacturing Company?

A. Yes.

Q. The Victor Manufacturing Gasket Company is directing the defense of the case?

A. Yes.

Mr. Owen: That is all, Mr. Lyon.

Mr. Boyken: I will move to strike out that testimony on the ground it is irrelevant and immaterial to any issue tendered by the pleadings in the case.

The Court: I will reserve a rule on the motion until the case is submitted.

Mr. Owen: Your Honor, that closes our prima facie case.

Mr. Haight: I would like, your Honor, to offer in evidence a certified copy of the file wrapper and contents of the Johnson patent in suit. May this all go in?

Mr. Owen: Yes.

Mr. Haight: Which number is that going to be? We are going to offer depositions and in the depositions the exhibits [111] are lettered throughout the alphabet and then with double letters, that is, AA to FF, and it would be most convenient on the record to keep those same exhibit numbers.

The Court: The exhibits you are now offering are in addition to those in the depositions?

Mr. Haight: These are in addition.

The Court: Suppose we continue from there on.

The Clerk: Could I suggest that we start with AAA?

Mr. Owen: I have no objection if they want to introduce the depositions.

Mr. Haight: Then I offer that as Defendant's Exhibit AAA.

The Court: That is the file wrapper?

Mr. Haight: That is the file wrapper.

(File wrapper of Johnson patent was marked Defendant's Exhibit AAA in evidence.)

[Defendant's Exhibit AAA appears in book of exhibits.]

Mr. Haight: I next offer in evidence as Defendant's Exhibit AAB a book of patents. Would you like me to have me, Mr. Owen, put the list on the record? I have all of the patents set up in the answer and in the notice, and then I have separate in that same volume the file wrapper references, and then I am going to offer two others that are not in the notice.

Mr. Owen: The only ones in that list to which I shall object are the last two that are being offered; my only objection to those is that we did not get notice of them thirty days before the trial.

Mr. Haight: They are only going in for the purpose of [112] showing the state of the art.

Mr. Owen: If they are only for that purpose there is no objection.

Mr. Haight: They are only for that purpose.

Mr. Haight: Do you wish, Mr. Owen, for me to read these, or shall I just hand them to the reporter and he can put those in this report and save the time of reading them? Is that all right?

Mr. Owen: Yes.

(The book of patents is marked Defendant's Exhibit AAB.)

[Defendant's Exhibit AAB appears in book of exhibits.]

The documents referred to by Mr. Haight read as follows:

“PATENTS SET UP IN ANSWER

No. 1,040,308	Godley, Oct. 8, 1912.
1,617,587	Frumveller*, Feb. 15, 1927.
1,740,929	Loock, Dec. 24, 1929.
1,905,800	Chandler, Apr. 25, 1933.
1,983,746	Fitzgerald, Dec. 11, 1934.
2,000,341	Larch*, May 7, 1935.
2,013,333	Anderson, Sept. 3, 1935.
2,052,762	Gits, Sept. 1, 1936.
2,071,403	Heinze, Feb. 23, 1937.
2,089,461	Winter, Aug. 10, 1937.
2,094,160	Oldberg*, Sept. 28, 1937.
2,114,908	Peterson, Apr. 19, 1938.
2,116,240	Heinze, May 3, 1938.
1,817,095	Penick, et al., Aug. 4, 1931. [113]
1,861,153	Lee, June 7, 1932.
1,996,210	Lord, et al., April 2, 1935.
2,004,669	Miller, June 11, 1935.

*Added by amendment.”

“PATENTS CITED BY PATENT OFFICE
IN PROSECUTION OF JOHNSON
PATENT IN SUIT

No. 15,061	Re. Cantrell, et al., Mar. 15, 1921.
1,817,095	Penick, et al., Aug. 4, 1931.
1,905,800	Chandler, Apr. 25, 1933.
1,925,729	Gits, Sept. 5, 1933.
2,028,634	Walker, Jan. 21, 1936.
2,052,603	Christenson, Sept. 1, 1936.
2,052,762	Gits, Sept. 1, 1936.”

Mr. Haight: Now, I would like to offer in evidence depositions taken in Chicago and in Toledo as Defendant's Exhibit——

The Court: I think we needn't give the depositions an exhibit number. I never followed that practice. You might just describe the depositions and they will be considered in evidence. You might say for the record what depositions they are.

Mr. Haight: Yes, I will. These depositions appear in two volumes in this action, one volume being the depositions of R. J. Gits, Fred A. Reeves, James Zap, Beatrice M. Krejce, taken at Chicago, and in the second volume the depositions of Fred L. Haushalter and G. L. Tarbox, taken at Toledo, and [114] various exhibits that are now present and that are identified on the record from Exhibit A through the alphabet and AA to and including FF.

The Court: Very well, they all may be admitted.

Mr. Owen: That is all the exhibits are offered in evidence?

Mr. Haight: Now, in addition I have, Mr. Owen, photostatic copies—I have only one copy each of these two patents, but you can check them later. I think you will find them all right, so I am going to offer photostatic copies at this time. One is of the patent to Cunningham, 1,930,708, filed December 21, 1931, and issued October 17, 1933, and the other is the patent to Padgett, No. 2,093,572, applied for October 4, 1934, and issued September 27, 1937. Mr. Owen suggests that those be limited only for the purpose of showing the prior art and the offer is so limited.

The Court: Do you want them marked as one exhibit?

Mr. Haight: May I have the Cunningham exhibit marked as AAC and the Padgett as AAD?

The Court: They may be admitted and marked.

(The patents were marked, respectively, Defendant's Exhibits AAC and AAD, in evidence.)

[Defendant's Exhibits AAC and AAD appear in book of exhibits.]

Mr. Haight: Will you take the stand, Mr. Aukers?

Before proceeding with the examination of this witness——

The Court: Let the witness be sworn. [115]

ALBERT J. AUKERS

called as a witness by the defendant; sworn.

The Clerk: Will you state your name to the court.

A. Albert J. Aukers.

Mr. Haight: I am going to ask the witness to use some of these large representations, these very large ones, which I am not going to put on the record, at all. I have, however, smaller copies like this, and what I am going to do when we finish with them, we will hand these copies as we go along. I think it will not be necessary to mark each one of these as an exhibit, they are just enlargements of the drawings appearing in the patents, and they

(Testimony of Albert J. Aukers.)

have been colored, and I find them very convenient to work with. I would like at the end to offer these.

Mr. Owen: As an exhibit?

Mr. Haight: As an exhibit.

Direct Examination

By Mr. Haight:

Q. Mr. Aukers, where do you reside?

A. 7157 South California Avenue, Chicago, Illinois.

Q. What is your occupation?

A. I am product engineer for the Victor Manufacturing & Gasket Company of Chicago, Illinois.

Q. In what business is that company?

A. In the manufacture of gaskets, oil seals, and packing.

Q. How long have you been with that concern?

A. Thirteen and three-quarters years.

Q. What is your age? A. 35. [116]

Q. What have been your various positions, if you have had various positions with that concern?

A. Initially I joined the company in 1932 as a control chemist, and thereafter I held positions as research engineer, experimental engineer, assistant superintendent, mechanical testing engineer, field sales engineer, and for the past five years product engineer.

Q. That is your present position?

A. Yes.

Q. Now, very briefly, Mr. Aukers, what are your duties in that capacity?

(Testimony of Albert J. Aukers.)

A. In the capacity of product engineer I am responsible for the mechanical development of all of the products, the design, the testing, and following through, including contact with all our customers on the application of the products, both development and production.

Q. What was your education?

A. I am a graduate of the Armour Institute of Technology with a degree of Bachelor of Science in engineering.

Q. That institution is located where?

A. Chicago, Illinois.

Q. What year did you graduate? A. 1931.

Q. And immediately after that what did you do?

A. I joined the International Harvester Company, in Chicago.

Q. In what capacity?

A. As a metallurgist, chemical metallurgist.

Q. How long were you with that concern?

A. One year.

Q. Then what did you do next?

A. I joined the Victor Manufacturing & Gasket Company. [117]

Q. And have you been with them ever since?

A. Yes.

Mr. Haight: Now, may I have the large drawing of the Gits patent?

The Court: We will take the usual morning recess.

(Recess.)

(Testimony of Albert J. Aukers.)

Q. By Mr. Haight): Mr. Aukers, are you familiar with the construction of the oil seals illustrated and described in the Gits patent 2,052,762?

A. I am.

Q. Will you describe that construction to the court? And, if your Honor please, may the witness step down and use the large chart in describing the structure?

A. It is best to use in describing the structure the cross section illustrations such as Fig. 3, Fig. 2, and Fig. 4. Fig. 3 shows a peripheral portion No. 1, a cup bottom 2, and an axially inwardly offset radial flange 4.

Fig. 2 shows the molded resilient sealing member having the axial portion 6, and the sealing lip portion sub 5, around which is placed a mechanical coil spring 10. In Fig. 4 we have an expander ring 11, having two radial portions on it, encompassing the section 12. Those three components are assembled as shown in Fig. 5, with the axial portion of the molded resilient sealing member inserted into the depression of Fig. 5, as indicated in item 3; therein is placed the expander ring as indicated in Fig. 4. Then the complete assembly is expanded in Fig. 1 by a swedging or rolling operation [118] on the expander ring forcing it outward. Upon this action of the outward force and axial portion of the resilient molded sealing member 6 is forced outward in relation to the axially inwardly offset radial flange 4, such that portions of it are displaced around to the outward radial face and the resilient sealing mem-

(Testimony of Albert J. Aukers.)

ber is bonded to both sides of the radial face, and in that same action the sealing material is forced into the portion between the two radial walls of the expander ring and that results in the structure as shown in Fig. 1.

Q. How about Fig. 6, what does that illustrate?

A. Fig. 6 differs from Fig. 1 in that the molded resilient sealing member is leather. All other physical operations of the assembly are similar.

Q. Will you return to the stand and turn to the patent, itself, Mr. Aukers? I call your particular attention to column 1, page 1, beginning at line 39. Will you read that, please?

The Court: Is that in the book?

Mr. Haight: That is in the book. I was directing the witness' attention to column 1, page 1, beginning at line 39. Will you proceed, Mr. Aukers?

A. "In the forms shown in the drawing, the improved oil seal comprises a cup-shaped cylindrical shell having an inwardly extending flange at one end, the margin of which defines an annular aperture in which an axially-extending sleeve-like packing member is inserted and clamped by means of an expanded [119] clamping ring arranged to clamp one end of the packing member against the edge of the inwardly-extending flange."

Q. Now, that is true that you described on these figures? A. Yes.

Q. Now, the next sentence immediately following, Mr. Aukers.

A. "The packing member is preferably molded

(Testimony of Albert J. Aukers.)

from a suitable flexible material, such as synthetic rubber or the like, and is formed with integral external peripheral shoulders, one of which engages the flange of the housing to help secure the packing member to the housing and the other of which serves as a retaining means for a contractible spring surrounding the shaft-engaging portion of the packing."

Q. In respect to molded packing material, you said that No. 6 figure illustrates leather instead of a synthetic sealing member. A. I did.

Q. Is that leather molded? A. Yes.

Q. What is the custom in this art in regard to the treatment or handling of leather in order to make the sealing elements?

A. Upon completion of the tanning or other treatment operations it is formed in molds in a press.

Q. I call your attention to column 2 on the same page of the Gits patent, and I will read:

"As shown in the drawing, the improved seal housing or shell 1 is formed with an integral inwardly-extending flange 2 at one end and the inner margin of the flange 2, [120] which is annular and defines an annular aperture 3, is offset inwardly as at 4, the ange 2 and the offset portion 4 extending in a generally radial direction and at right angles to the side walls of the shell or housing, 1."

Where is that on this easel?

A. It is this portion right here, following through from the peripheral portion 1.

(Testimony of Albert J. Aukers.)

Q. Will you then describe the cause of that particular formation, this flange marked 2, this offset portion, and then the extending of the ange downwardly—what is the resiliency effect upon the bottom of the cup?

A. In forming the cup member shown you have the peripheral portion and the cup bottom as indicated in 2, and then the next forming operation is one that is axial and inwardly in the offset so that a radial flange is formed in relation to the radial portion 2.

Q. That is O.K., but what about the cup bottom, this portion here? How does it look, looking at it from this direction?

A. The cup bottom is radial in reference to the peripheral portion. [121]

Mr. Haight: Well, I don't want to lead, but it will be helpful.

Q. Is the central part of the cup member as I indicated, the bottom, inset? A. Definitely.

Q. O.K. I think I will go more rapidly, Mr. Aukers, if you will stay down here and point out to the Court and I will do the reading; we will make progress that way.

I am now calling attention to page one of the same Gits patent, column two, beginning at line twenty four:

“An external peripheral shoulder 8”

—Where is that?

A. There (indicating).

Q. (Continuing)—

(Testimony of Albert J. Aukers.)

“is provided adjacent to the end of the clamping portion of the packing member and an annular counter bore or seat 9.”

Where is that?

A. Right there (indicating).

Q. Continuing——

“is formed in that end because of the offset arrangement of the clamping portion 6.”

Where is the offset upon which the clamping portion is fixed? A. Right there (indicating).

Q. Where is it in Figure 1?

A. Right there (indicating).

Q. Again, the same page, column two, line forty-three, I read:

“The packing member is preferably molded of a flexible [122] substance having superior wearing qualities and which will not be affected or deteriorated by oil or grease. The substance known as Koroseal, manufactured by the Goodrich Rubber Company, is found to have suitable properties for this purpose and to give excellent results.”

What is Koroseal?

A. Koroseal is a synthetic resin known as a polyvinyl chloride. It has various properties, of which for oil seals a resistance to oil is an important factor.

Mr. Haight: In passing, your Honor, that was the material referred to and used in the Gits structure as shown in the depositions.

(Testimony of Albert J. Aukers.)

Q. And I continue to read at line fifty:

“A clamping member comprising an annular ductile ring 11 is utilized to secure the packing member to the flange of the shell or housing 1.”

That you have described.

I turn to page two, column one, beginning at line twenty six:

“Thus, when the slamping ring is expanded to secure the packing member to the shell flange, the clamping portion 6 of the packing member is forced into the groove 12.”

Where is that? A. Right there (indicating).

Q. I continue the reading:

“and at the same time that portion of the packing member that extends beyond or outside of the shell flange is [123] extruded over the edge thereof so as to overlap its margin as at 13 in Figure 1.”

A. Right there (indicating). And of course equally right there, that portion (indicating).

Q. “In this way the packing member is secured to the shell flange in such a manner that it is immovable relative thereto in either axial direction.”

I will read again, page two, column one, beginning at line thirty seven. I read:

“As shown in Figures 1 and 5, the offset portion of the flange 2”——

(Testimony of Albert J. Aukers.)

Point that out as right there (indicating). Continuing the reading:

“is disposed inwardly relative to the end of the shell a sufficient distance so that the outer end of the clamping portion 6 and the outer face of the clamping ring 11 will be flush with the end face of the shell 1.”

A. 12, 6 (pointing).

Q. “Thus, when the seal is inserted in a housing it may flatly abut the inner end of the housing or any other means that might come into engagement with the seal when it is in operative position.”

I shall not call the witness' attention to further matter in the specification, but when it comes to argument I shall call attention to features of claims one, three, five and seven. [124]

Will you now turn, Mr. Aukers, to a representation of the Peterson structure. Just a moment until I find the Peterson patent. The Peterson patent, your Honor——

The Court: I have it.

Mr. Haight: ——is No. 2,114,908.

Q. Are you familiar with the structure of that Peterson patent? A. I am.

Q. Will you turn to the representation enlargement of the Peterson drawings on the big chart before you and explain the construction to the Court?

A. Figure 5 of the structure is an oil seal having

(Testimony of Albert J. Aukers.)

a peripheral portion 20; a cup bottom; an axially inwardly offset radial flange with axial extension. The molded resilient sealing member is bonded to the axially inwardly offset radial flange by an adhesive. The outer radial face of the molded resilient sealing member lies within the plane of the cup's bottom. The portion of the smallest axial inner dimension and radial section is there for protection to the lip of the element in handling and processing.

Q. In connection with that patent I call attention to the specifications, page one, column one, beginning at line forty nine:

“The improved molded grease retainer of this invention is composed of a minimum of parts including specifically the flexible packing or diaphragm 10 which may be of [125] leather or some synthetic material, and this can be of different shapes or dimensions, two representative shapes being shown in Figures 2 and 4, respectively.”

And then in regard to the attachment of the packing element, I call attention to column two on that same page:

“the packing element 10 is attached to the inner face of the support or housing 14 by means of some suitable adhesive such as a synthetic resin composition or some other adhesive, as, for example, casein,”

(Testimony of Albert J. Aukers.)

and again in the same column, beginning at line thirty one:

“In Figures 3 and 4, the packing element 16 is of a slightly different shape which has been found such as to eliminate the necessity of a constricting element, and this is mounted in a synthetic housing 18 by suitable cementing or otherwise, it being noted in this instance that the housing is shaped to accommodate the exterior face of the packing element.”

In this present disclosure of what material does he make the housing itself?

A. The material on the housing of Figure 5 is steel.

Q. And again in column two on page one:

“As shown in Figure 5, the housing 20 may be of metal, either sheet metal formed into channel shape as shown or it may be die cast either open or solid, and the diaphragm 22 can be attached to the corresponding portion [126] of the housing or shell by a suitable adhesive or in some other manner.”

I think I will pause at this time and take that big chart of the patent in suit. This will justify what I have just read in regard to the attachment “on in some other manner.” At this time, Mr. Aukers, I am not going into the details of the Johnson patent, but you are familiar with that patent in suit, with its construction?

A. I am, sir.

(Testimony of Albert J. Aukers.)

Q. Will you describe to the Court the different methods of attaching the sealing element to the shell that are illustrated and described in the Johnson patent itself?

A. Figure 1 presents a method of bonding wherein the radial flange is sandblasted and coated with cement and the resilient sealing material bonded through vulcanization and the use of the cement.

The sealing member 14 is also bonded to the radial flange by the flow of the rubber through the perforations.

And coming to Figure 2, the sealing member is bonded to two radial flanges, one being the cup bottom, the other being a washer, by means of clamping by the pressure of 34 against the inner structures. It is also bonded to the radial flanges by means of flow of the molded resilient material into the perforations of the inner flange. It is also bonded by the aid of the indentations 32.

Figure 4 shows a method wherein the sealing member— [127] molded resilient sealing member is bonded to the two adjacent radial flanges by means of clamping the pressure being against the inner structure by 34. The cup bottom has perforations and the molded resilient member is initially bonded to it by the flow of the rubber into the perforations.

Figure 5 and Figure 6 are duplicates of Figure 1 in process of bonding.

The Court: May I ask a question?

Mr. Haight: Certainly.

(Testimony of Albert J. Aukers.)

The Court: It doesn't interrupt your line of thought?

Mr. Haight: Oh, not at all.

The Court: Q. When you speak of molding, is the rubber poured in a liquid state into the mold?

A. In molding any member such as a sealing member, sir, you have a mold which is shaped to the contour shell of the finished article. So you place in that either sheet material or any form that you have, and the heat and pressure molds it, or, better saying, conforms it to the shape that you desire.

Q. For use in the seal itself?

A. For use in an oil seal, yes, sir.

Mr. Haight: Q. Now we will turn to Chandler. We have a big drawing of that.

I am calling your attention now to the Chandler patent, No. 1,905,800, applied for August 16, 1932, and issued April 25, 1933. Are you familiar with the construction illustrated [128] and described in that patent, Mr. Aukers? A. I am.

Q. Will you tell the Court what that construction is?

A. In order to describe the construction I desire to first describe Figure 3. Figure 3 shows the primary shell which has a peripheral portion 10, a cup bottom 14, and an axially inwardly offset radial flange 18. And it is upon the formation of this structure a space is resultant axially between the axial portion of the axially inwardly offset flange and the outer portion of the peripheral wall. The molded resilient sealing member is placed therein.

(Testimony of Albert J. Aukers.)

and upon a mechanical swedging operation applied at the radius of the axially inwardly offset portion of the radial flange, the flange that was initially radial is inclined by means of that operation. A force is applied resulting in bonding of the molded resilient sealing member between the axially inwardly offset flange as inclined and the other peripheral portion as shown.

Continuing, there is placed on the sealing member a coiled garter spring, which spring functions to retain the sealing member against the shaft during its operation of rotation, reciprocation or oscillation. The final portion of the sealed structure as you see is where in the portion 30 of the periphery is formed over to function to retain the garter spring and protect the edge of the element. And this view shows very clearly a cross section of seal in an application. It shows that here we have a shaft which operates in rotation, [129] reciprocation or oscillation. It shows a bore in a housing. It shows a shoulder against which the seal rests. Thus, the seal is pressed into the assembly from this direction, or, as I look at the chart from left to right, with the proper mounting tool and ends in the position as shown. Now in respect to that patent, I call attention to page one, column one, beginning at about line thirty three, and I read:

“The ring shown in the illustrated embodiment of the invention comprises essentially a one-piece housing which is drawn and spun by successive operations into the final desired

(Testimony of Albert J. Aukers.)

shape, a circular packing of leather or the like which is immovably clamped within the housing,”

that is the point you are indicating?

A. Yes, sir.

Q. And again, beginning at line fifty, at the bottom of column one, I read:

“Clamped within the housing is a circular leather packing having an inner axial portion adapted for engagement with the shaft, and an offset portion rigidly clamped within the housing not only to hold the packing but to seal against leakage of oil and grease between the packing and housing.”

Now where is that offset portion?

A. Right there, sir.

Q. Now Mr. Johnson was making, as I thought, it very clear as to where you have to guard against the passage of oil. What [130] are those points as illustrated in the Chandler oil seal?

A. There are two points you have to guard against the passage of oil—along the axis of the shaft or along that outer portion of the shaft which is sealed by means of the axial portion of the sealing member. You also have to guard against the passage of oil by its passage into the inner structure of the shell and through the bonded section.

Q. Yes. And then what about this point up here?

(Testimony of Albert J. Aukers.)

A. You do have to guard against leakage or passage of oil due to the necessity of a proper press-fit of the outer periphery of the seal and the bore of the housing. In all instances the o. d. or outer periphery of the seal is slightly larger than the bore into which it is pressed, and it is then that inner pressing that gives us the seal at the outer peripheral junction of the bore and the seal o. d.

The Court: Q. You use the term "bonded"; is that different from clamping?

A. No, bonding—clamping is just another means of bonding, sir.

Q. Bonding is any means by which there can be a secure affixation of a thing that you want to put in there? A. That is right, sir.

Q. Whatever it is?

A. Whatever it is, as long as you confine it.

Mr. Haight: Now I am not going to read the method of constructing this, but I will call attention to page one, [131] column two, beginning at line eight four, and I read:

"The two portions of the packing, namely the clamping and sealing portions, are connected by an inclined wall to avoid the formation of sharp or abrupt shoulders in the packing, and offset the reduced portion of the packing in an axial direction from the larger clamping portion."

Will you point that out again?

(Testimony of Albert J. Aukers.)

A. Right there (indicating). This is what is swedged in an inclined plane.

Mr. Haight: I shall not at this time, your Honor, but later I shall call attention to some material and in the specifications on page two, but I think it is clear and need no explanation from this engineer, whom I do not offer as a patent expert; I am just having him help us on the constructions.

Next we will turn to the Winter patent. We have no large drawing of that.

By the way, your Honor, is there any question in your Honor's mind as to how these seals are mounted now?

The Court: As to how they are what?

Mr. Haight: How they are mounted and how they serve. Here is a seal. You prevent the oil from going through here by the press-fit; you prevent it from going around here by the grip, bonding; and you prevent it from going through here by a lip. They are all the same in that regards; they all must function in that way. [132]

Now on the Winter patent we have no large drawing of that. Have you one of these enlargements of the photostats (handing the paper to the witness)? A. I have.

Q. That is Winter. Now, Mr. Aukers, are you familiar with the construction of this Winter patent as shown in the drawings and described in patent No. 2,089,461? A. I am.

Q. Will you describe that construction to the

(Testimony of Albert J. Aukers.)

Court? And I wish to call particular attention to Figure 5.

A. Figure 5 is the structure of an oil seal having a peripheral portion 13 a cup bottom 26, an axially inwardly offset flange 16. The molded resilient sealing member is bonded to the inwardly offset flange 16 by means of clamping, and the leading edge of flange 16 is inturned into the molded resilient sealing member. A coiled garter spring is placed on the inner axial portion of the sealing member for its proper retention against a rotating shaft, and the portion 22 is formed over from the peripheral portion 13 to retain the spring in its position.

Mr. Haight: Is that construction clear to your Honor?

The Court: Yes, I have it.

Mr. Haight: Q. All right. I call your attention to certain parts of the specification, page one, column two, beginning at line sixteen:

“The channel 16”—that the witness has pointed out—and I read: [133]

“receives one edge portion 17 of a sealing ring composed preferably of leather and in order to positively secure the ring in the channel and in a sealing manner therein, the free leg of the channel may be bent outwardly as indicated at 18 so as to crimp the leather where it enters the channel.”

And in the same column, line forty one, I read:

(Testimony of Albert J. Aukers.)

“The advantage of this turned-in wall 22 is that a separate washer for holding the spring in place is not necessary.”

Also on page two, column two, I read——

Mr. Owen: What line, please?

Mr. Haight: From line seven to line fifteen:

“The sealing ring shown by Fig. 10 and which may be used in the seal shown by Fig. 5 and others, may be formed from the ring 35 by outwardly turning and molding the flange 27 without deforming the portion 28. In this construction also the portion 28 which engages the shaft is not deformed and consists of leather in its natural grain condition.”

Continuing:

“While the leather ring is employed preferably joined and cemented as indicated at 34 in Fig. 2, it is possible to use other materials and even leather and to provide a ring without any joints.”

Where is that cementing in this Winter structure?

A. The cementing referred to in the last part read is to the Figure 9 wherein the molded resilient sealing member in itself is in a cemented form for economy and manufacture.

Q. I also call attention to page four of the specification, column one, beginning at line eight:

“and including an outer cylindrical wall for pressed-fit engagement with the housing and a centrally apertured end wall which is formed

(Testimony of Albert J. Aukers.)

as an integral part of the outer wall and extends inwardly from one end of the latter, and means on the end wall in inwardly spaced relation to the outer wall for attaching the large diameter portion of the packing ring to the end wall, said packing ring being attached to and supported solely from the end wall independently of the outer wall, with the attaching means and the packing set inwardly from the outer wall."

Where is that construction illustrated in the drawing?

A. That construction is shown in Figure 1 and Figure 5. It is that portion that bonds the molded resilient sealing element by clamping within the flange 16.

Q. Will you now turn to Fitzgerald, we have a large drawing of that. Mr. Aukers, I am calling your attention to the Fitzgerald patent, No. 1,983,746, filed January 17, 1934, issued December 11, 1934.

Mr. Haight: Have you it, your Honor?

The Court: Yes. [135]

Mr. Haight: Q. Are you familiar with the construction shown in the drawings and in the specifications of this Fitzgerald patent, Mr. Aukers?

A. I am.

Q. Will you describe that structure? Use the large chart.

A. Using Figure 1 of the chart, the structure of the seal is one having an outer peripheral por-

(Testimony of Albert J. Aukers.)

tion 20, a cup bottom 19, an axially inwardly offset radial flange 16. The molded resilient sealing member 11 is bonded to the axially inwardly offset radial flange by clamping between its inner portion and the adjacent radial wall the top channel wherein the turned over portion 21 applies clamping pressure for bond. The coil spring 12 rests on the sealing element in its axial position for positive retention of the element on the shaft and for satisfactory seal therein. The Z-shaped channel is described as the top channel. It functions to retain the coil garter spring on the sealing lip of the member and to protect the sealing lip edge. It is to be noticed that the radial wall 16 is inwardly offset axially in relation to the cup bottom 19.

Q. And that cup bottom is of what conformation?

A. The cup bottom portion is radial at this point.

Q. And there is a depressed portion in its center, is there not?

A. That is right, which axially inwardly offset and that depressed portion is radial.

Q. Is there any advantage in having that rim on the cup bottom [136] that is indicated as 19 in the Fitzgerald structure?

A. The rim portion as shown has the advantage wherein it can be a protecting edge for the material and where force is applied to press it into a housing.

(Testimony of Albert J. Ankers.)

Q. How do you press it into a housing? Do you use a tool? A. Yes.

Q. And where do you apply the tool?

A. The tool is applied against the radial face 19, and the force in mounting into a housing is applied from this direction from left to right.

Q. Why isn't the tool applied in this depressed portion indicated along that lead line from the numeral 16?

A. Normally in pressing in a metal encased oil seal such as this or equivalent structures, a positive amount of force or pressure is required because the outside diameter of the seal is larger than the bore into which it is pressed. The average figure for a seal of a one and one-half inch shaft is four to five thousandths of an inch larger. Therefore it is important, and very important, that the force of pressure inward, by any means that you use, whether it be a blow with a hammer or with a flat tool, or with a hydraulic press, that the pressure be applied at that point where no distortion of the seal is possible and if the mounting tool is smaller in diameter than the radial wall force 19, all of that force will then be applied on this inner radial face. It's manufactured from relatively thin metal so that upon that force the plate [137] would be displaced outward causing an outward turn of the element and the seal would not function satisfactorily.

Q. All right. I wish to call attention to two or

(Testimony of Albert J. Aukers.)

three matters in these specifications. Page one, column one, and I read at line sixteen:

“The invention, therefore, comprises in combination a flexible packing member and helical spring, a cage enclosing said packing and spring, said cage comprising an ogee annulus and a second section having a return bend forming an external annular bead and with the edge peened over the ogee member to clamp the flexible packing member between a flange of the ogee member and the side wall of the companion member.”

Where is that ogee member?

A. The ogee member is this top channel portion described initially.

Q. I read again on the same page, same column, beginning at line thirty-four:

“The oil excluding ring which forms the subject-matter of this application is adapted to be employed in conjunction with a rod or shaft 10, which may be a rotating shaft or a reciprocating shaft, or may be stationary and the ring may rotate or reciprocate relative thereto.”

Now there are three different uses, as I understand it, described there. Will you explain them? [138]

A. One, the first use would be where the seal would be mounted into a bore in a housing and the shaft would rotate. The second would be where the same seal would be mounted in a housing and the shaft would reciprocate. The third application

(Testimony of Albert J. Aukers.)

would be one where the seal—the shaft would remain stationary and the housing into which the seal is pressed would rotate upon the shaft's axis so that the shaft would stand still and the seal assembly into which it is pressed would rotate.

Q. Speaking generally of these oil seals, is it true that they are adapted to be used where the shaft rotates, or where the shaft reciprocates, or where the shaft remains still and the mechanism to which the oil seal is attached rotates?

A. Definitely, yes, sir.

Q. I read again from column two, beginning at line six, of the same page:

“The other member of the cage comprises a substantially plane part 16 at its outer edge bent at 17 to form one side of a U-bend 18 which produces an external bead 19. The opposite side of the U-bend provides a substantially cylindrical part 20 which is peened over the outwardly extending flange 13 of the ogee member, as shown at 21.”

I also want to read a summary found in claim one, and I begin at line thirty five: [139]

“a pair of annuli clamping the annular part there between, said cylindrical part extending through and beyond one annulus, and a return bend integral with the annuli forming a bead extending opposite from the cylindrical part and increasing the external bearing surface.”

Will you now turn to the Frumveller patent.

(Testimony of Albert J. Aukers.)

The Court: I think we will take the noon recess at this time.

Mr. Haight: I think your Honor will be interested to know that I have taken care of five out of twelve devices I am going to ask this witness about, and then the others I shall try to explain myself; with what success remains to be seen.

(Thereupon a recess was taken until 2:00 p.m. this date.) [140]

Afternoon Session, Thursday, January 24, 1946
2:00 P.M.

ALBERT J. AUKERS

recalled as a witness for defendant; previously sworn.

Direct Examination
(Resumed)

By Mr. Haight:

Q. Mr. Aukers, I now draw your attention to the Frumveller patent, No. 1,617,587, filed September 2, 1924, issued February 15, 1927. Are you familiar with the construction as shown in the drawings and described in that patent? A. I am.

Q. Will you explain the construction? We have no large drawing of that. Here is one of the semi-enlarged ones.

A. I wish to refer to Figure 4 and describe the application of the invention. The invention is one wherein a connection—pipe connection is made to seal on a ball joint, and between it and the socket

(Testimony of Albert J. Aukers.)

member. You will note that the angled face of the sealing member 42 rests against the ball joint and that the angular radial portion of the retaining flange is clamped within the two sections of the socket member. There is applied axially a coil spring forced on the structure to assist in seal.

Referring to Figure 5, the description of the structure is as follows: A metal diaphragm—

Q. Wait a minute. If you read from anything, state where you are reading.

A. I am not reading yet. [141]

Q. O.K.

A. A metal diaphragm has a radial portion 43, an axially inwardly extending flanged portion 44, having two axial steps connected by inclined portion 45. A molded resilient sealing member is bonded to both sides of the larger diameter axial flanged portion and the adjacent inclined portion. The bonding is by means of chemical adhesion.

Q. Looking at Figure 5, where is the sealing member?

A. The sealing member is portion 41 and face 42 of that member is pressed against the ball joint to seal.

Q. The sealing member is that darkest part which is cross hatched in the drawing, isn't it?

A. Yes, sir.

Q. And what is that member, as I read it, is reference 45 that extends into it?

A. That is the inclined portion of the axial flange.

(Testimony of Albert J. Aukers.)

Q. And is it offset at any point?

A. Yes, sir, it is offset at the larger diameter axial portion that doesn't have any number and is an extension of 45.

Q. And what is this device used for according to the disclosure of the Frumveller patent?

A. Well, quoting from the patent, column one, line ten through fourteen:

“The invention is intended particularly for use as a part of a flexible pipe connection between the steam or air pipes of adjacent cars of a railway train.”

End of quotation. [142]

Q. I call your attention to page two, column one of the page, and I read beginning at line forty-two:

“The sealing device now to be described, forming the principal feature of the present invention, is adapted to maintain a fluid-tight joint between the ball and socket members of the flexible pipe connection at all times, while permitting free angular and rotative movement of the ball member within the socket. The gasket 30, which is formed of a hard rubber composition or similar material, has a cylindrical outer surface adapted to fit snugly within the recess 2 in the socket member and be longitudinally slidable therein.”

What would be the practicability of inserting a shaft in the place of that socket member?

A. That can be done practically.

(Testimony of Albert J. Aukers.)

Q. I notice that the figures that you have called attention to, to wit, the Figures 4 and 5, are described on page two of the patent beginning in the second column at line 103. Will you read that portion, please?

A. "In the modified form of the apparatus, shown in Figs. 4 and 5, the gasket 41 has its forward inner face curved as before, at 42, to engage the inner end of the ball member. The flat flexible diaphragm 43, extends completely across the rear end of gasket 41, and has a short cylindrical flange 44 extending into the open rear [143] end of the gasket and an outwardly flaring skirt 45 embedded within the gasket. A metallic sheathing or casing 46 surrounds the outer cylindrical surface of gasket 41 between the gasket and the socket member."

Q. And that flaring skirt 45 is the member with its angular portion that you pointed out in Figure 5 in that dark cross-hatched portion, is that right?

A. It is, sir.

Q. Now calling your attention to page three of the patent, column two, beginning at line eighty-seven, I read simply the phrase:

"an annular flexible diaphragm having one edge embedded in the gasket, and secured at the other edge to the socket member."

As you read it, to what structure does that refer?

A. That refers to diaphragm 43 on my Figure 5.

(Testimony of Albert J. Aukers.)

Q. We will now turn to the Penick patent. We have a large drawing of that.

I call your attention to the patent to Penick, No. 1,817,095, filed April 29, 1929, and issued August 4, 1931. Are you familiar with the structure found in the drawings and described in the specification in that patent? A. I am, sir.

Q. Will you describe it, pointing out the principle as you refer to them on this big drawing?

A. Figure 1 shows a cross section of a novel pump packing [144] assembly. The functional parts are parts 6 and 5 which are the sealing means on the movable plunger identified on the shaft as 14. The sealing means 6 and 5 are assembled in the pump portion against number 7 with controllable pressure applied by means of portion 16 through pressure on screw 21.

Figure 2 shows a detailed structure of the sealing means in the assembly. Part 6' is angular portion which has in it perforations or holes 12, and an offset or suture portion 11'. A molded resilient sealing member is bonded to both sides of the sutured or flanged portion, and the resilient sealing material flows into the perforation to the outer annular face of the flange. It is to be noted that the rubber is bonded to both sides of the flange 11'.

Q. I notice that this patent is entitled "pump packing." Does that serve to act as a seal in any way, and if so, will you please explain.

A. Yes, it is a definite seal.

Q. What does it seal?

(Testimony of Albert J. Aukers.)

A. It seals a given fluid within the assembly chamber upon the motion of the plunger against seepage or bypass along the portion shown at the cross section and along faces adjacent to 11' of the packings.

Q. And the seal is between what parts of the structure shown in Figure 1?

A. The seal is between the outer diameter of the plunger and the bore in the housing portion of the pump.

Q. That is what I, as a farmer, would call its cylinder, I [145] take it.

A. Yes, sir.

Q. Now I am going to read a bit from the specifications of this patent, and I shall read slowly and I wish you would point out the structures as I go along. I call attention first to page one of the patent, column one, beginning at line forty:

“The inner margins of the plates 5, 6”——

Where are they?

A. (The witness indicates.)

Q. “——are faced with packing rings, as 8, 9,”——

A. That is 8, blue.

Q. “——formed of rubber, rubberized fabric, or other suitable packing material, which are connected, or joined to said plates by the sutures 10, 11.”

Where are they?

A. That is these little flanged portions shown there in the enlarged section in Figure 2 as 11'.

Q. And what color is it in Figure 2?

A. Red.

(Testimony of Albert J. Aukers.)

Q. "In the form shown in Figure 2 the plates, as 6', in addition to the suture 11', forming a connection between the plate and packing ring 9', is also provided with perforations, as 12, through which the material of the packing ring 9' is moulded to form additional means for securing said ring 9' to the plate 6'."

You have pointed those out as we have proceeded, have you not? A. Yes, sir. [146]

Q. By the way, speaking of molded, I am calling your attention to one of the exhibits in the Gits depositions which are identified on the record, and this is Defendant's Exhibit No. M. Will you describe to the Court that construction.

A. The construction I have in my hand shows an expander ring molded—no, an expander ring held within the molded resilient sealing member and with the expander ring retained within an inset portion of the member on the inner diameter.

Q. And how is it gotten in there? How is it placed in there?

A. The ring is placed in there by means of initial pressure seemingly during a molding operation.

Q. Now that ring that is placed in there during the molding operation is what ring on the Gits patent? Let's take No. 5 for instance.

A. That is——

Q. Wait a minute. Is that 5?

A. That happens to be Figure 5, yes, sir.

Q. O.K. A. That is the ring 11.

(Testimony of Albert J. Aukers.)

Mr. Haight: You see, your Honor, how small that is compared with the size of the drawing, but it was suggested to me by the molding that we struck in this patent.

Now I think we will go to another one now. The next one after Penick is Miller. There are two sheets that are enlarged that I am showing your Honor.

Q. I call your attention, Mr. Aukers, to the Miller patent, No. 2,004,669, filed September 9, 1932, issued from June 11, 1935, [147] and entitled "packing cup." Are you familiar with the construction disclosed in the drawings and described in the specification of that Miller patent? A. I am.

Q. Will you describe it, choosing such figures as you think will be helpful?

A. Yes, sir. Before proceeding with the description I wish to take the opportunity of explaining the cross section design and believe that quoting from the specification will quickly explain it.

Q. All right, proceed.

A. Page one, column one, line four through eight:

"More specifically, the invention relates to an improved vacuum controlled piston for an automobile clutch operating cylinder, the piston being of the type employing a composition packing cup."

End of quote.

Therefore, the piston is that part. referring to Figure 1, which is composed of shaft 5, nut 21,

(Testimony of Albert J. Aukers.)

flanges 6 and 7, and molded composition material 10. The assembly just described——

Q. Now wait just a moment. The shaft is 5 at the center? A. Yes, sir.

Q. And what are those two members 6 and 7 that seem to be secured on the end of the shaft?

A. Those are two metal flanges.

Q. What shape are they?

A. They are disc shaped.

Q. Circular? A. Circular. [148]

Q. And I notice something that is cross hatched at the ends between those two members. What is that?

A. That is the molded resilient cup packing or sealing member.

Q. All right. Will you now proceed?

A. The molded resilient cup material packing or sealing member 10 is bonded to the adjacent faces of the discs 6 and 7 by means of clamping. Figures 2 and 3 use the same method of bonding, that is, clamping. And Figure 5——

Q. That is on another sheet, is it not?

A. The next page. Figure 5 shows a radial portion 7, which is part of a disc, and to it is bonded a molded resilient sealing member 26. The plate 7 is initially brass plated, and in the molding operation the resilient composition material is bonded to both sides of plate 7 on the outer periphery of the radial portion at the incline as shown so that it is on both sides of that inclined portion——

(Testimony of Albert J. Aukers.)

Q. Now wait a minute. In Figure 5 we have the shaft 5 in the center? A. Right.

Q. And then we have this plate 7 that is secured on its end and held by the nut 21 apparently, is that right? A. Yes, sir.

Q. Now the sealing member is that element up at the end or the periphery of the disc-like member and you said it was bonded to both sides. Both sides of what and where?

A. It is bonded to both sides of plate 7.

Q. Yes.

A. At the outer inclined portion of the plate.

Q. All right. Will you now proceed?

A. Figure 7 shows a further assembly composed of shaft 5, nut 21, and plate 6. And in this instance the molded resilient sealing member is bonded to one side of plate 6, on the side to the right of the drawing sketch in my hand.

Q. And how is the bonding effected there?

A. By initial use of brass plate and chemical adhesion.

Q. Now I call your attention to page one of the specification of this patent and down at the bottom, line fifty-five, where it refers to Figure 5, I read:

“Fig. 5 is a sectional view of a cylinder and piston in which the packing cup is molded to the piston disc.”

And then in respect to 7, I find in column two, line 4 and following, this:

“Fig. 7 is a sectional view of a cylinder and

(Testimony of Albert J. Aukers.)

piston showing another form of unitary piston disc and packing cup construction.”

And down that same column at line twenty-two I read:

“According to the invention, a rubber composition packing cup is clamped between the outer ends of the two discs 6 and 7.”

What function does the packing element serve in the structures to which you have referred?

A. The packing element functions to act as a vacuum seal within the assembly sealing within the inner walls of the cylinder. [150]

Q. I call your attention to page two in regard to the structure at the bottom of column one, at line sixty-two. Will you read that?

A. “In the construction disclosed in Figs. 1, 2 and 3, the packing cup is held between the ends of the two piston plates or discs 6 and 7. According to the construction illustrated in Fig. 5, a packing cup 26 is permanently molded onto the piston disc 7, thereby eliminating the use for the piston disc 6. In order to secure the packing cup 26 to the piston disc, the surface of the disc upon which the composition packing cup is to be molded, is first brass plated and then the cup is molded onto the disc and the adhesion of the molded cup to the brass plated disc is such as not to require a follower or compression disc as employed in the construction shown in Fig. 1.”

(Testimony of Albert J. Aukers.)

Q. Then on further description, I call your attention to column two on page two beginning at line eight. Will you read that on the record, please?

A. "It will be noted that a portion of the flared end of the piston disc 7 extends into the body of the packing cup, so that the packing cup is molded over the end of and part way down the right hand side of said disc. This is done in order to better ensure that atmospheric pressure in chamber 16 will not tear the packing cup from the piston [151] disc 7 when the pressure in chamber 17 is reduced."

Q. And then some of the other constructions are referred to in the following six or seven lines. Will you read those?

A. "The construction illustrated in Fig. 7 is very similar to that in Fig. 5, except that the packing cup 28, which is similar to the cup shown in Fig. 1, is permanently molded to the piston disc 6 instead of to the piston disc 7, and according to this construction the packing cup is on the right hand side of the piston disc 6 and subject to the atmospheric pressure in chamber 16, so that in operation there is no tendency for the packing cup to be torn from the piston disc."

Q. Now is there any sealing function performed by any parts of these structures? A. Yes.

Q. What?

A. The function of seal is performed by the

(Testimony of Albert J. Aukers.)

complete assembly of the piston as described previously, particularly as sealed within the cylinder against which rests the molded resilient sealing material.

Q. And in this particular patent what is the device for?

A. The device is for a vacuum controlled piston in an automobile clutch operating cylinder.

Q. So what is sealed?

A. Well, you seal air.

Q. All right. Now just summarize a bit, in the sealing part what different methods are disclosed in this patent as securing the sealing element?

A. In Figure 1 the sealing [152] element is bonded to the discs 6 and 7 by clamping.

Q. All right.

A. In Figure 5 the sealing disc—the sealing member is bonded to both sides of the disc 7 by means of chemical adhesion and the use of brass plate?

A. Figure 7 is bonded to the disc 6 by chemical adhesion and the use of brass plate.

Q. Is that bonded to one side?

A. That is bonded to one side, yes, sir.

Q. Now what does the brass have to do with the adhesion, if anything?

A. The brass assists in obtaining good adhesion.

Q. Will you next turn to the Heinze patent. Again we have no large drawing. I mean Heinze '403, originally filed April 9, 1934, and issued February 23, 1937. Are you familiar with the construc-

(Testimony of Albert J. Aukers.)

tion disclosed in that patent? A. I am, sir.

Q. Will you describe it, please, and don't go too rapidly.

A. Referring to Figure 1, the structure shows a metal encased oil seal assembly having a peripheral portion and an axially inwardly offset flange 12, with inturned portion axially 14. A molded resilient sealing member 18 is bonded to the axially inwardly offset flange and the adjacent radial flange 16 by clamping. It is to be noted that the leading edge of the axial portion 14 is imbedded into the resilient sealing member to assist in improved bond.

Referring to Figure 2, this structure shows an oil seal [153] having a peripheral portion with axially inwardly offset U-shaped radial flange. The molded resilient sealing member is bonded to the adjacent sides of the U-shaped flange and the inturned portion is embedded into the sealing member for additional aid in bond.

Q. In that drawing of Figure 1, starting over at the inturned flange at 14 and going to the right where we find a lead line from 18, the drawing might be misleading. What do we see in that dotted portion in the drawing?

You see it runs a way down in the figure, Figure 1? A. Yes.

Q. What is all that?

A. Well, the portion that is hatched, which is what I assume you mean by dotted——

Q. That is right.

A. ——is the molded resilient sealing member,

(Testimony of Albert J. Aukers.)

the outer axial portion of which is bonded to the section 14 and radial flange 16, and the inner smaller axial portion 18, which would rest on the shaft to seal with the pressure of the coiled garter spring 22.

Q. Where is the sealing lip in that seal?

A. The sealing lip is the edge—the righthand edge of portion 18.

Q. And is that oil sealing lip going down in a curved structure in the drawing?

A. That is right, sir; that is the sealing lip in the full circumference.

Q. Now I notice on the specification of this Heinze patent on page one, column one, beginning at line sixteen, the following, [154] and I read:

“Another important object of the invention is the provision in a grease retainer of an armored packing of leather or the like which, on account of its construction, shall provide a better resistance to blows or other extraneous forces directed against a grease retainer, particularly in efforts to place the same in position.”

Does that refer to the same matter that you described this forenoon? A. It does, sir.

Q. In getting the press-fit to put it in place?

A. Yes, sir, that is the reinforcement that is used in some instances.

Q. Are there any other parts of that specification that you would like to refer to as making clear the structure?

(Testimony of Albert J. Aukers.)

A. I would like to read page one, column two, lines twelve through thirty for the description of Figure 1.

Q. Proceed.

A. "The reference numeral 10 indicates generally a casing for one of the improved grease retainers of this invention, the same preferably embodying an annular sheet metal cup-like element having the usual opening there through for the passage of a rotatable shaft about which the grease retainer is adapted to be mounted.

"Slidably fitted into the outer casing 10 is an [155] inner casing 12 which is approximately L-shaped in cross-section as best shown in Figure 1 and has an inwardly bent inner edge 14, which edge, together with a relatively thick metal washer 16, acts to clamp the offset annular rim of a packing element 18 which is preferably of leather or some similar flexible material. It will be noted that the inturned edge 14 of the element 12 closely grips the edge of the leather packing against the inner periphery of the washer 16, which is seated against the inner side face of the shell 12."

Mr. Haight: And there is one other part I would like to place on the record in that same column, page one, beginning at line forty seven. It refers to Figure 2 that you have described and I read:

"In Figure 2 is shown a modification of the

(Testimony of Albert J. Aukers.)

invention wherein an outer shell 24 is provided, and into this shell is fitted a combination armor and clamping element for the packing 26 which clamping element comprises a sheet metal annular structure 28, preferably U-shaped in cross-section as shown in Figure 2, one of the legs of which is shorter than the other and is turned inwardly as shown at 30 to provide a suitable clamping engagement with the in-turned end of the leather packing 26."

Now will you turn to the patent to Lord? We have a big [156] drawing of that.

Q. Your attention is directed, Mr. Aukers, to the patent to Lord, No. 1,996,210, filed June 23, 1931, and issued April 2, 1935. Are you familiar with the construction shown in that as described in the specifications? A. I am, sir.

Q. Will you describe this, referring particularly to Figure 1, Figure 8, I think, and Figure 10, or any others that you think will make the subject matter clear?

A. Initially, the purpose of the structure shown as Figure 1 is to act as a vibration dampener on any service wherein a unit such as an electric motor or the like in operation has some vibration and it is desired to seal that vibration from the adjacent table or other location wherein it is used, whether it be on the bottom of a washing machine or any unit. The method obtained in the vibration dampening is through the molded resilient sealing material.

Figure 1 shows a step portion having an axial

(Testimony of Albert J. Aukers.)

leg 3, inwardly inclined portion 2, and axial portion 1. The molded resilient sealing member is bonded to both sides of axial portion 1 by a surface union during vulcanization and is also bonded to the outer face of the cylindrical portion 4 in the same chemical bonding operation.

Figure 8 shows a structure wherein a flat plate 16 is used and the molded resilient sealing material is bonded to both sides of the plate 16 as shown in portion 18 by surface [157] union through vulcanization.

Figure 10 shows an L-channel having leg 22 and radial portion 21, and to the inner diameter of the L-channel as shown on the description section 26 is bonded a molded resilient sealing member through surface union and process of vulcanization.

Figure 11 shows an end view of Figure 10, and that can again be transmitted to indicate its application as in Figure 9, with two sections, one at each end of the electric motor for dampening the effect or sealing of vibration.

Q. Mr. Aukers, did you have to do with the coloring of these various figures that appear on many of these drawings, not only the big ones that we have been referring to but those that I mentioned earlier that we are going to bind together and hand to the Court later? Did you have anything to do with that? A. Yes, sir.

Q. Give us the key to your coloring? Is there a key that applies to all of these?

A. Very definitely, sir.

Q. Tell us what it is.

(Testimony of Albert J. Aukers.)

A. In all instances the metal portion of the structure as given is in red. In all instances the resilient sealing member is in blue.

Q. I notice some green over here.

A. Pardon me.

Q. On the one of the Johnson patent.

A. In the Johnson patent a further color is the color of green. That is the color applied on the channel that we call in our profession a [158] top channel.

Q. And that is usually of what material?

A. Metal.

Q. Now, Mr. Aukers, will you return to the stand for a moment please?

Mr. Haight: I would like to have this marked with our next exhibit number.

Mr. Owen: If your Honor please, before they are offered in evidence I would like to know more about where they come from.

Mr. Haight: If you give me a chance to examine the witness, both of us will find out.

Mr. Owen: Yes. Now you are marking them as an exhibit.

Mr. Haight: I am marking them for identification.

Mr. Owen: I beg your pardon.

Mr. Haight: I haven't offered them. I will if we can prove what they are.

The Court: Two exhibits?

Mr. Haight: There are three.

The Clerk: Fastened together, your Honor.

(Testimony of Albert J. Aukers.)

(The objects referred to were marked Defendant's Exhibits AAE for identification.)

Mr. Haight: Q. I have had marked for identification, and identification only at this time, three little structures for identification Defendant's Exhibit AAE. Are you familiar with those?

A. Yes, sir. [159]

Q. Did you have anything to do with the making of them? A. No, sir.

Q. Where did they come from?

A. They came from the Lord Manufacturing Company.

Q. And what do they represent?

A. They represent the vibration dampeners as described in Figure 1 and Figure 8 of Patent 1,996,210.

Q. Let me get this clear. You have three there. Does one of them represent one figure and one another? What is the fact?

A. Well, of the three, two of them represent Figure 1 and one represents—pardon me, one of them represents Figure 7 instead of Figure 8 as originally mentioned. That is right.

Q. Will you describe each of those structures?

A. The small cup-shaped metal portion shows bonding to the inner diameter of the formed cup and molder resilient sealing member and the sealing member is bonded to both sides of the cup portion. It is also bonded to the cylindrical portion in the center of this smallest diameter cup section. In both instances the bonding is by vulcanization.

(Testimony of Albert J. Aukers.)

The larger diameter cup section is identical in construction and bonding to the small diameter cup section.

The third portion as indicated in Figure 7 of patent 1,996,210 is an outer flat plate, to the sides of which on the inner diameter is bonded a molded resilient sealing [160] member, and it is bonded on both sides. On the inner diameter of the plate is a cylindrical portion, and the molded resilient sealing material is bonded to it.

Mr. Haight: If the Court please, these apparently are recent samples and have no authenticity except to illustrate the figures in the drawing. On that basis I offer them in evidence.

Mr. Owen: No objection.

The Court: Very well, they may be admitted.

(The objects were thereupon marked Defendant's Exhibit AAE in evidence.)

Mr. Haight: Q. Now, Mr. Aukers, turning to the Lord patent, is there any description of this bonding found therein?

A. Yes, I will read from the patent, page one, column one, line fourteen through nineteen:

“When an outer plate is used it is provided with an opening in which the joint is arranged. The rubber is secured by surface union, preferably by bonding during vulcanization to the faces of the plate along the periphery of the opening.”

(Testimony of Albert J. Aukers.)

Continuing, if I may——

Q. If you please.

A. Page one, column two, line six through fifteen—no, line five through fifteen for greater clarity:

“The joint, as shown in Fig. 1, has a plate 1 with side flanges 2 terminating in feet 3. It is provided with a central member 4 and a rubber member 5, the rubber member extending at 6 along and preferably bonded during vulcanization to the central member 4 which is in the form of a tube and extending over and preferably bonded during vulcanization to the edges of an opening 7 in the plate 1 forming rings 8 of rubber on opposite faces of the plate adjacent to the periphery of the opening.”

Q. And there is a description in relation to Figure 8 that begins at the bottom of that same column. Will you put that on the record, please?

A. “In Fig. 8 a modified joint is shown in which there is an outer plate 16 having a joint opening arranged therein. A central member 17 is in the form of a plate, the outer periphery of the plate 17 being within the periphery of the opening in the plate 16. A rubber member 18 bridges the space between the plates 17 and 16 and has”——

Reading on the next page, page two, column one——

“has an extension 19 on the outer periphery bonded to the faces of the plate 16 adjacent to

(Testimony of Albert J. Aukers.)

the opening. The rubber likewise has extensions 20 on its inner periphery which extend over and are preferably bonded to the faces of the plate 17."

Q. And then down in the same column on page two, at line [162] fifty six, the following appears, which I read:

"In all of these joints it is preferable to secure the rubber to the joint members by bonding during vulcanization so that the rubber of the joint member is put under initial tension through the shrinkage of the rubber."

I think there are some other descriptions of that bonding. Here is one on page two, column two, line forty two. I read:

"In Fig. 3 buffing wheels 29 are shown operating simultaneously on the top and bottom of a plate, such as is used in the joint shown in Fig. 1. After the plate is properly processed for bonding the rubber 30 having a proper bonding face is laid on the top and bottom surfaces of the plate bridging the opening 7 in the plate."

There are some others, but I think that is enough, Mr. Aukers.

Now we will turn to the Anderson cut. We have no large drawing of that; we have one of the intermediate enlargements.

We direct your attention to the patent to Ander-

(Testimony of Albert J. Aukers.)

son, No. 2,013,333 filed March 17, 1933, issued September 3, 1935.

The Court: This is a process patent.

Mr. Haight: Yes, it is. This patent, as the Court has observed, relates to a method of producing oil seals. I think we can disregard the method unless it is helpful in [163] showing the construction. Are you familiar with the construction of the devices therein shown and described? A. Yes, I am.

Q. Will you tell us how they are comprised?

A. On Figure 3 I desire to describe the structure of the oil seal shown in the assembly. The oil seal has a peripheral portion 10, an axially inwardly offset radial flange 16—no, radial flange 22, pardon me; a molded resilient sealing member 16 is bonded to the in-turned edge of the radial flange 22 and the inner face of the peripheral portion 10.

The portion coil as shown in the structure is the radial portion spun over in the operation for the protection of the sealing member and garter spring 20.

Q. Now how is the sealing element secured in that seal?

A. The sealing element is secured in the seal by the embedding of the in-turned—out-turned radial portion of the axially inwardly offset radial flange 22 in the operation wherein it is clamped between the in-turned portion and the inner portion of the outer periphery. [164]

Q. Is there any part of the specification that

(Testimony of Albert J. Aukers.)

assists in describing that structure to which you wish to refer? A. Yes, sir.

Q. Will you please do so?

A. Page 1, column 1, line 19 through 26:

“The cup drawn blank with the gasket and spring assembled therein is received in a mold cavity, and the upper and free edges of the cup drawn blank are curled inwardly and rearwardly to provide a circumferential space for enclosing the sealing end of the gasket, and rigidly clamping the outer sealing end of the gasket against the cylindrical wall of the housing.”

Continuing, page 1, column 1, lines 51 through 54:

“Enclosed within the housing is a flexible leather seal ring or gasket 14, having an outer clamping portion 16 extending axially within the cylindrical portion of the housing, and an inner sealing portion 18 also extending in an axial direction.”

Q. In respect to the material of which the sealing element is made, I call your attention to column 1 of page 1, line 14, and following:

“Thereafter a molded and shaped gasket of leather or the like having an outer clamping portion generally concentric with the wall of the shell and extending axially thereof is assembled together with a retaining spring.”

Mr. Haight: I think that sufficiently describes that one, if your Honor please. I shall turn now

(Testimony of Albert J. Aukers.)

to Heinze, 240. This patent is numbered 2,116,240, filed August 30, 1933, issued May 3, 1938, and entitled "Grease retainer with clamped packing." Are you familiar with the construction shown and described in that patent, Mr. Aukers?

A. I am, sir.

Q. Will you please describe the same? I think we will have you refer to Figs. 3, 6, 7, and 13 and any others that you think may be helpful in clarifying your description.

A. Referring to Fig. 3, we have a metal encased oil seal having an outer peripheral portion, an axially inwardly offset radial flange 28, having an axial inturned portion on the inner diameter. A molded resilient sealing member is bonded to the axially inwardly offset radial flange and the adjacent L-channel 30. The inturned portion of the radial flange on its smaller axial dimension is embedded into the sealing member for an aid in bond.

Fig. 6 shows a unitary—there is an oil seal structure having a peripheral portion, an axially inwardly offset radial flange 52, and an axially inturned portion on the flange. The molded resilient sealing member 50 is bonded to the adjacent sides of the axially inturned portion of the radial flange 52 and the wall of the radial washer 54. It is to be noted that the inturned portion of the radial flange 52 on the smaller axial dimension is embedded into the molded [166] resilient sealing member to aid in bond.

Fig. 7—

(Testimony of Albert J. Aukers.)

Q. Just a moment. What is that structure indicated by the numeral 58 in Fig. 6?

A. The structure 58 in Fig. 2 is a U-shaped structure which has an axially inturned portion resulting in the formed radial flange 52.

Q. You said Fig. 2. I wanted to know what is indicated by that part of Fig. 6 indicated by the numeral 58.

A. I read the description from Fig. 6.

Q. Oh, I see. I didn't know that.

A. I'm sorry, sir.

Q. When you read from the specification you must always make reference so that we know. But what is that structure 58, I will ask you, in Fig. 6?

A. The structure 58 in Fig. 6 is a U-shaped channel portion having a peripheral portion and axially inturned—inwardly inturned portion.

Q. How does the end of the sealing structure look when we look at the end of it from the right hand looking left?

A. The face 52 is inward in relation to face 58.

Q. Depressed in relation to the bead 58, is that right?

A. Well, the word "depressed" applies.

Q. Will you proceed with Fig. 7, please?

A. Fig. 7 shows a seal construction having a peripheral portion and an axially inwardly offset radial flange 62 with a small diameter axial portion. The molded resilient sealing member is bonded to the inturned portion of radial flange 62, and the C-shaped [167] channel 64. The leading edge of the

(Testimony of Albert J. Aukers.)

inturned portion of radial flange 62 is embedded into the molded resilient sealing member for aid in bonding.

Q. Now, turn to the next Fig. 13, please.

A. Fig. 13 shows an oil seal structure having a peripheral portion 112, and an axially inwardly offset radial flange with axially inturned portion. The flange mentioned is No. 108. The molded sealing member 106 is bonded to the adjacent sides of the member 108, and the inturned portion of the small diameter radial part of 108 is embedded in the molded resilient sealing member for aid in bond.

Q. Referring to the specification, column 1 page 1, I notice that these units are—and I quote beginning on line 11—

“so designed that the unit may be driven into position with regard to a shaft without any danger of damaging or mis-shaping the unit by such driving blows.”

That structure is illustrated in Fig. 6, is it not?

A. It is, sir.

Q. And on that same page of the specification, column 2, in regard to the sealing element, I notice beginning at line 17 the following, and I quote:

“In the various figures, there are shown certain types of grease retainers which embody essentially a resilient packing element preferably composed of leather and which is somewhat cylindrical in shape with one portion [168] of slightly larger diameter than the other.”

(Testimony of Albert J. Aukers.)

And that is again referred to at the very bottom of that column in the following beginning at line 53:

“a packing element 12 which is preferably composed of leather and which is somewhat cylindrical in shape,” etc.

Now, on page 2 is there any part of that specification that you wish to refer to?

A. Yes, sir, page 2, column 1, line 17 through 23:

“The gripping contact of the larger edge of the leather packing 12 is accomplished by an inward turning by spinning or the like of the upwardly turned inner edge of the cup-shaped element 10 after the washer 16 is in position in the cup, whereupon a tight gripping relationship of that edge of the leather packing results.”

Q. Will you describe Fig. 6? I notice a reference to that figure on page 2, column 2, beginning at line 20. Does that help clarify in any way?

A. Yes, sir.

Q. And will you read it, please?

A. “In the modification shown in Fig. 6, the packing 50 is made shorter, one edge, however, being gripped between a cup-shaped gripping element 52 and the inner face of an annular washer 54, this assembly being in turn inserted into a cup-shaped housing 56, the periphery of the larger end of this housing being bent downwardly and inwardly as shown

(Testimony of Albert J. Aukers.)

at 58 into a gripping contact with the outer face of the cup-shaped gripping element 52 whereby another unitary structure results which [169] is proof against hard usage and the like."

Q. There is a similar description of a modification in Fig. 7 immediately following, which we will not pause to read.

On page 3 at the bottom of column 1 reference is made to Fig. 13. I think that is helpful. Will you put it on the record?

A. "In the modification shown in Figure 13, the leather packing 106 is gripped at its edge of greater diameter by the shorter leg of a U-shaped gripping element 108, the longer leg of which incloses the usual garter spring 110, and this assembly is then placed in an exterior housing 112 which acts as a protective structure which is reinforced by the U-shaped element 108. It will be noted that the inward bending of the shorter leg of the U-shaped element 108 forms a one-piece clamping structure."

The Court: I think we will take the afternoon recess at this time.

(Recess.) [170]

(Testimony of Albert J. Aukers.)

Q. In this art we have been discussing some patents refer to gaskets. Are those in any instances sealing members? A. Yes, they are.

Q. In the record many sealing materials are mentioned, Duprene and Neoprene, Hycar and Thiokol, as well as leather and composition material. In oil seals are those as they are used molded resilient sealing members? A. They are.

Q. What is the difference between Duprene and Neoprene?

A. The Duprene and Neoprene are identical. A change in name was desired by manufacturers to get the name Dupont out of it so it was changed to Neoprene.

Q. Some reference was made when Mr. Johnson was on the stand as to the use of oil seals as spacers. Are you familiar with any such use?

A. One use that I know of in my experience.

Q. What was that?

A. Some years ago a stoker manufacturer had a gear case assembly which was very unique, wherein he has bushings around the shaft and adjacent to the bushing he had to have an oil seal. The bushing had a tendency to slide back and forth so that the edge would come in contact and hammer against the seal inner flange, and in that instance we could not use any of our standard design seals, and we had to revert to a very special design having a washer twice the thickness of the standard thickness of metal as a reinforcement of the sealing member.

(Testimony of Albert J. Aukers.)

Q. Is there any or are there any reasons why oil seals [171] could not have been used?

A. Yes.

Q. Why?

A. The structure of an oil seal is such that it is composed of light metal; by light metal I mean thin metal in relation to other parts within or without the assembly. Because of the assembly, be it the cup shaped member to which the sealing element is bonded in any manner or be it the inner shell which is indicated in green, in either instance, this being thin metal, any blows applied to it in the operation of the units results in deformation of the metal parts and damage to the parts, and this damage results in immediate or more rapid failure of the oil seal either in sealing along the shaft or along its outer periphery.

Q. What opportunity have you had to observe the development of oil seals in various uses?

A. Well, I have been in on the oil seal development and manufacture of the product with the Victor Gasket Manufacturing Company since 1935. During that period I spent four years calling on all of very good customers, the purpose in mind being to apply our oil seals in all the various types of applications, so that it became my duty to recommend the application of oil seals, because an oil seal is a specialized item, and we have to be trained in its details; and during those years of visiting the various manufacturers I had an opportunity of studying and observing and installing oil seals in automobiles, trucks, tractors, axles, washing ma-

(Testimony of Albert J. Aukers.)

chines gear cases, stoking units, pumping mechanism, and a host of other items which came to me. In the past 5 years in my position as product engineer, all technical matters, all product applications [172] came to my desk for recommendation or decision, and in those instances of course we received prints, cross section sketches, reports of our field engineers, so that we have at hand very complete data, and in all of the instances great care is taken to protect the seal member from extraneous blows or wear or anything of that kind.

Q. In your experience have you known of any instance where it has been necessary to change the structure of oil seals, that it is protected by any inherent structure from contacting with adjacent moving parts? A. No.

Q. What would happen if it had contacted with adjacent moving parts?

A. To me it would be contacting of two parts that did not have functional value. It means something has to give, something has to wear. Every piece of the seal in contact with any given moving member means that we are rubbing, and we are cutting some part of that member off that is being rubbed upon, and if that falls into the assembly it can cause rapid wear in the gear assembly, or if it falls to the outside it can cause rapid wear of the operating face of the seal and it will leak.

Q. Calling your attention to the structure represented in Plaintiff's Exhibit No. 3, you notice therein many oil seals that are mounted upon some shafts. A. Yes.

(Testimony of Albert J. Aukers.)

Q. In such mountings do you find any contact of adjacent moving parts? A. No, I do not.

Q. What would happen in that specific structure if you did put it against adjacent moving parts?

A. Well, looking at the specific structure, let us say at the portion of the seal that is adjacent to the ball bearing, the channel portion would contact the inner face of the bearing, causing rubbing and friction and wear on that face with metal deposition within the assembly.

Q. Do you know when the Victor Manufacturing Gasket Company first began to make oil seals of Type A or Type H, or either of them?

A. Yes, I do.

Q. When did the defendant first put those on the market?

A. I will have to speak from records.

Q. What records are you referring to?

A. I have before me our record card, identified as Quotation and Selling Records. It is a record card that is maintained in our cost department file.

Q. Is that kept in the regular course of business?

A. Yes.

Q. In the plant and office of the Victor Manufacturing & Gasket Company? A. Yes.

Q. How are they kept?

A. They are kept in definite locations of our cost department and locked every night.

Q. Is that where you obtained that particular card? A. Yes.

(Testimony of Albert J. Aukers.)

Q. I notice you have some other similar cards with you. What are they?

A. That is a carbon copy of the original card, hand copy, just as the original.

Q. Does the card which you hold in your hand—never mind the [174] copies for the moment—disclose and contain a record of the first sales made of either of these types of seals, Type A and Type H?

A. Yes.

Q. What is the first date recorded?

A. The first quotation in selling records is in reference to the oil seal identified originally as SDM 176, which card was later identified with the equivalent number 60,870. On this card I find an entry as follows, the customer, Spicer Manufacturing Corporation, a quotation to this customer on this oil seal in lots of 25 to 500 in graduation. The date of the quotation is June 30, 1936. Do you wish the prices?

Q. Not unless the other side wants them, but I want later to put the card in evidence.

A. Following this quotation we have a record that we received an order for 25 pieces on July 9, 1936, for a specific price. This card refers to our Type A design as identified at that time, or as shown on the devices throughout.

Q. How do you know from the record that is Type A?

A. Well, we have in our engineering department engineering folders in which the records are very

(Testimony of Albert J. Aukers.)

carefully kept of the manufacture of the tools and the number of tools, and design of the product from the tools.

Q. Have you such a one referring to this early beginning?

A. We have on file that record.

Q. Have you the record with you?

A. No. I have another record equally as good.

Q. A record of what?

A. Of the structure of the oil seal and giving the identifying number.

Q. How from that do you know that it was Type A?

A. In one of our very original catalogs we were issuing to our salesmen and some of our good customers—this is merely standard construction of Victor synthetic seals, and on the face are shown the types of seals as designed, and on the lower portion of page 1 is identified the seal number, size and type. Note that after SDM-176 the type A is shown. This catalog is dated July 29, 1936.

Q. When did you make your first sales of the type H?

A. I have here a sales card identified as SDM-191, which is of our type H construction and we have the following note on this card, that we sold the following customer, Richard Wilcox Manufacturing Company quoted on 50 seals on 11/6/36. We received an order from that company for 50 pieces on November 10, 1936.

Q. When was it shipped?

(Testimony of Albert J. Aukers.)

A. I do not have the date here. The date of receipt of order would be crossed out if it was not filled, but I do not have the actual date of shipment.

Q. You said something about the date that the tools were made for the Type A. What can you tell us about that?

A. Well, in the manufacture of our oil seals we of course have to make the necessary tools, the channel tools, the molds, the spring-winding equipment, and after we have all the tools we then make the product, make enough of them to put in stock, so that we can submit the stock to the customer in any manner he desires.

Q. When do you make them?

A. On the Type A we made the tools of the SDM-176 as I remember it during June, 1936; we completed them about two weeks before the quotation date, which was June [176] 30.

Q. Now, on Type H.

A. On Type H, of which I spoke in this record, our SDM-191, we completed the tools on that one in the middle of July, 1936. In that instance we did not have occasion to market it until November.

Q. Do you have a personal recollection of the making of the tools and of the first making and selling of these two types of seals, Type A and Type H?

A. I have a personal recollection of the testing of the product from the tools.

Q. Did you have anything to do with that testing?

A. Yes.

(Testimony of Albert J. Aukers.)

Q. What did you have to do with it?

A. Well, in 1936 I had the job of testing all the oil seals as made from all of the tools. I was the one in fact, who had the job of putting them on the shafts and on the test boxes, recording the data and making the observations, removing the same and making the necessary comments.

Q. Were those tests all made before you made any sales? A. Yes.

Q. Now, you have referred to certain order and sales records. Will you pick out the ones to which you have made reference?

A. Well, on the first one, being SDM 191, I have Richard Wilcox Manufacturing Company, quantity per quotation and quantity after receipt order.

Q. That is one. In your other?

A. On SMD 176 I have the Spicer Manufacturing Company quotation and order.

Q. By the way, was that the Toledo Spicer Manufacturing Company? A. Yes. [177]

Q. The same one referred to in the depositions?

A. Yes.

Q. Did you make copies of these for us?

A. Yes.

Mr. Haight: I want to offer these in evidence. Of course, only the originals are admissible.

Mr. Owen: If you tell me that the copies are the same I will take your word for it.

Mr. Haight: Would it be all right to offer the copies in evidence and you check them with the original? They told me they wanted to keep the

(Testimony of Albert J. Aukers.)

original. You can take them when we close today. I will offer in evidence the copies.

Q. Is this the first one you spoke of?

A. SDM 176 is Type A.

Mr. Haight: The one that the witness has just referred to I would like to have marked as Defendant's next in order.

(SDM 176 Type A is marked Defendant's Exhibit AAF.)

[Defendant's Exhibit AAF appears in book of exhibits.]

Mr. Haight: The one that you referred to is what? A. SDM 191 is Type H.

Mr. Haight: The one that the witness has referred to I ask be marked as Defendant's Exhibit next in order.

(SDM 191 Type H is marked Defendant's Exhibit AAG.)

[Defendant's Exhibit AAG appears in book of exhibits.]

Mr. Haight: With the consent of counsel I am offering these copies in evidence instead of the original.

Q. Now, you referred to some other documents.

A. I have before me the information on the size of seals, with reference to the type, which is dated July 29, 1936.

Q. That is the document that you had reference to as showing [178-9] different types of seals and

(Testimony of Albert J. Aukers.)

from which you read, "Superseded prints prior to July 29, 1936," is it not? A. Yes.

Q. There are two sheets. What is the second sheet?

A. The second sheet gives the number and the tool size, as well as the type of the seals available at that time for which tools were made.

Q. This was given out at that time?

A. To our salesmen and some good customers.

Q. (By Mr. Owen): At about that date?

A. At that date.

Q. (By Mr. Haight): Type A, the first of these sheets, is a correct representation of the Type A here in question, is it? A. Yes.

Q. Type H which appears on here is a correct representation of the Type H we are quarreling about here? A. Yes.

Mr. Haight: This document, consisting of two sheets, the first of which bears the legend "Standard Construction of Victor Synthetic Seals, Victor Manufacturing & Gasket Company, Chicago, Illinois," and at the bottom "Supersedes all prints prior to July 29, 1936," and the second sheet bearing the legend, "Standard Construction of Victor Synthetic Seals" at the top, with the legend at the bottom, "Supersedes all prints prior to July 29, 1936," I offer as Defendant's Exhibit next in order.

(The sheets were marked Defendant's Exhibit AAH.)

[Defendant's Exhibit AAH appears in book of exhibits.]

(Testimony of Albert J. Aukers.)

Mr. Haight: I am advised by Mr. Geppert we have not any copies of these. Would you like to have photostats of these? [180]

Mr. Owen: Yes.

Mr. Haight: May we have the privilege of withdrawing these in order to make photostats for the other side?

The Court: Yes.

Q. (By Mr. Haight): Now, Mr. Aukers, when did you first learn of the Johnson patent in suit?

A. I was advised about it by Mr. Gammie in 1944.

Mr. Haight: Your Honor will recall that the application of the Johnson patent in suit was August 6, 1936, and I shall argue that we were making sales and selling them before application was even made. I am also going to argue later, not now, that a claim here in suit was not inserted in this application until two years later. I think you may cross-examine—Just a moment.

Q. Didn't I ask you, Mr. Aukers, perhaps not, are these Victor seals used on both rotating and reciprocating shafts? A. Yes.

Q. That is true of both Types, Type A and Type H?

A. We do not make the A, but the H we do.

Q. When did you stop making the A?

A. Well, we stopped making the tools for any of the A, to the best of my remembrance, in the latter part of 1939.

(Testimony of Albert J. Aukers.)

Q. Now, you then discontinued Type A and went to Type H? A. Yes.

Q. Was there any reason for that change?

A. Yes.

Q. What were they?

A. As we obtained requests for oil seals [181] from our customers we noticed a definite requirement for a smaller cross section of the seal; in other words, a customer would have a specific shaft size and he would also come to us and say, "I want that oil seal for a given bore size," and in numerous instances when that came about we were unable to manufacture the type A, because the cross section of the seals, the distance required between the shaft in the bore and the housing was too small to permit that, so upon study the form of the internal conical flange permitted the manufacture of the seal with the smallest possible cross section.

Q. In your Type A the distance from the periphery of the seal down to the bottom of the sealing element is greater than the distance between the same structure in Type H, is that the idea?

A. No, that is not exactly what I mean. I mean that you are limited to the range of sizes of oil seals that you can make with this type.

Q. That is A?

A. Because the limited specification on the cross section that you could use, wherein you can use H because you can have the conical flange to reduce the cross section and have a satisfactory seal.

Q. Will you tell the court just a little, I do not

(Testimony of Albert J. Aukers.)

want much detail, as to the various sizes in which these seals are made? Do not give us all about them, just a few illustrations.

A. It is such a large quantity that it is hard to say, but I will hazard a statement of the fact that there are approximately [182] 500 sizes, and it is quite likely that for a given shaft there could be as many as 14 bore sizes; in other words you have, let us say, $1\frac{1}{2}$ inches for the shaft size, and you might have 14 different bores that a customer would use.

Q. I will be content if you will illustrate with three or four sizes.

A. I believe the best thing to do is quote from a catalog.

Q. Without stopping to quote from the catalog, tell us about from the smallest to two or three or four inches.

A. Well, I can remember that we have some oil seals let us say $1\frac{1}{2}$ shaft, and we could put 1 $\frac{15}{16}$ inches on the ODT, or 2 inches, and then we could go all the way up to $3\frac{1}{4}$ or $3\frac{1}{2}$.

Q. How about the smaller units?

A. On the smaller units I can remember some seals with a quarter-inch shaft, very small size, and an OD of $\frac{3}{4}$ of an inch.

Q. That is good enough. They think I do not know what OD means.

A. The outer perimeter of an oil seal is known as OD or outer diameter, the ID would be the inner diameter.

(Testimony of Albert J. Aukers.)

Mr. Haight: In order to ask some more questions in the morning I would not turn the witness over for cross-examination, but I am going to turn him over right now. I don't want to think of any more questions.

Mr. Owen: Your Honor, they have dealt with so many patents here, I think I could condense my cross-examination a good [183] deal if I could work on it tonight and start on it tomorrow the first thing.

The Court: Do you have any more witnesses?

Mr. Haight: I have one more witness, Mr. Gammie, whom I am going to interrogate about the meeting that Mr. Johnson testified to in Chicago, which on direct I should say would not take over two minutes.

Mr. Owen: Why not do that now and I will cross-examine Mr. Aukers in the morning.

The Court: Then would you be able to finish tomorrow?

Mr. Owen: I might be able to, your Honor.

Mr. Haight: Might I ask what your Honor's practice is with regard to the depositions, as to whether we shall read them or consider them read?

The Court: Is there any ruling that would be required of the court in connection with the depositions?

Mr. Haight: No.

The Court: Then I suppose I will have to read them anyhow.

Mr. Haight: I hope your Honor won't suggest that they be read.

The Court: I am perfectly willing that you leave them the way they are and read them.

Mr. Owen: We could call attention to the relevant portions in our brief.

The Court: If you are going to submit any memorandum you [184] can call the attention to the things that you wish.

Mr. Haight: Will your Honor wish argument or briefs, or how do you wish to handle it?

The Court: It does not make any difference to me, whichever way you gentlemen prefer to submit it.

Mr. Owen: I might suggest I think we had better brief the case.

The Court: Maybe we had better wait until all of the evidence is in. Of course, I have not read the depositions.

Do you want to put the witness on?

Mr. Haight: I will be very glad to.

EDWARD GAMMIE

called as a witness for the defendant; sworn.

The Clerk: Will you state your name to the court?

A. Edward Gammie.

Direct Examination

By Mr. Haight:

Q. Where do you reside, Mr. Gammie?

(Testimony of Edward Gammie.)

A. Winnetka, Illinois.

Q. What is your occupation?

A. General sales manager for Victor Manufacturing and Gasket Company, Chicago.

Q. How long have you been with that company?

A. Since September, 1930.

Q. In a general way, what was your experience prior to that time? A. Prior to 1930?

Q. Yes.

A. I was a salesman for a hardware concern.

Q. During the time that you have been with the Victor Manufacturing & Gasket Company have you held different positions?

A. From 1930 to 1935 I worked on industrial business for the company. From 1935 to 1945, that is, May of 1945, I was industrial sales manager for the company in charge of original equipment sales for the company. Since May, 1945, I have been general sales manager in charge of original equipment sales together with replacement sales.

Q. Did you have anything to do with the application of the company's oil seals?

A. Only in so far as the sales are concerned.

Q. In connection with those sales, have you ever known of an instance where they have been used as spacers? A. I have not.

Q. Have you ever known of an instance where there has been any requirement for any inherent structure to protect it against adjacent moving parts? A. No.

(Testimony of Edward Gammie.)

Q. You have never known of their being mounted in that way, have you? A. No.

Q. Did you ever meet Mr. Johnson, the president of the plaintiff company? A. I did.

Q. When did you first meet him?

A. In May, 1939.

Q. Where did you meet him?

A. At the Union League Club in Chicago.

Q. How did you come to meet him there?

A. I was shown a letter which he had sent to us advising us regarding a seal [186] which he had patented.

Q. There was correspondence which lead to the meeting? A. Yes.

Q. At that meeting who was present?

A. Mr. Secrist.

Q. Anybody else? A. No.

Q. You were present? A. Yes.

Q. Mr. Johnson was present? A. Yes.

Q. And Mr. Secrist was? A. Yes.

Q. Mr. Johnson testified that he had three meetings with people in your concern? A. Yes.

Q. Were you present at any meeting except the one at the Union League Club?

A. The only meeting that I was present was just that one.

Q. Was Mr. Victor present at that meeting?

A. He was not present in the meeting, he did, however, shake hands with Mr. Johnson at lunch.

(Testimony of Edward Gammie.)

Q. Was it after your lunch that you had the meeting and discussion with Mr. Johnson?

A. No, it was before luncheon we had discussion with Mr. Johnson.

Q. And at that meeting there were present Mr. Johnson and Mr. Secrist? A. Yes.

Q. Is Mr. Secrist alive?

A. No, he is not.

Q. When did he die? A. In May of 1945.

Q. What was his connection with the Victor Company, if any?

A. He was sales manager for the company in charge of replacement sales. [187]

Q. At that time you were what?

A. Industrial sales manager in charge of original equipment sales.

Q. Did you take part in that conversation?

A. I did.

Q. Did Mr. Johnson? A. Yes.

Q. And Mr. Secrist? A. That is right.

Q. Did you make any memorandum of the subject matter of that conversation?

A. I did. Rather, I did not make a memorandum. I collaborated with Mr. Secrist in the making of a memorandum.

Q. When was that memorandum made in relation to the time that you had this meeting and conversation with Mr. Johnson?

A. It was either on the day of the meeting or very shortly thereafter, a day or two thereafter.

Q. Have you that memorandum with you?

A. I have.

(Testimony of Edward Gammie.)

Q. Will you produce it, please? A. Yes.

Q. You have handed me a typewritten document bearing date May 3, 1939, with a typewritten signature of C. C. Secrist. Is that the Mr. Secrist to whom you refer? A. Yes.

Q. Where did you get this memorandum?

A. It has been in my own desk, in my own file.

Q. In your own regular office files?

A. Yes.

Q. Kept in the regular course of business?

A. Yes.

Q. Will you read that memorandum to the court?

A. This memorandum is dated May 3, 1939.

“Conference with Lloyd Johnson of National Motor Bearings Company [188]

“Mr. Gammie and I met Mr. Johnson at the Union League Club to discuss the Johnson patent recently acquired. We pointed out to Mr. Johnson that we were not using his patent construction and that we were considering the purchase of the patent only because of the fact that we are making synthetic oil seals and there might be some advantage in owning the patent. We intimated that we thought it only had a nuisance value as far as we were concerned. Mr. Gammie said that we might be interested in buying the patent for something like \$1500.00 or \$2000.00.

“Johnson said that they were not in the synthetic oil seal business to any extent and that was one reason why he brought the matter to our attention. He said that he was not at all interested in selling

(Testimony of Edward Gammie.)

the patent for \$1500.00 or \$2000.00, which he regarded as 'chicken-feed' and that if the patent was of any worth at all it was worth at least \$10,000.00. He further said that he acted without the approval of his associates in offering the patent to Mr. Victor for \$10,000.00. He said he was not interested in selling the patent for even that amount. He said he preferred to hold the patent with the thought that it might be used for trading purposes later on. He expressed the thought that we would be getting certain patents from time to time and maybe later on arrangements could be made for cross-licensing under such patents if [189] acquired.

"He expressed the thought that he didn't want any more patent litigation because it is highly expensive and even if the case is won it costs so much in time and money that there is no net gain but probably a net loss. He would prefer to use patents for trading purposes, etc.

"He said they had developed a new type of oil seal and that they were more concerned in developing the merchandising of their new seals. He indicated that the new seal could be made on his present type of equipment whereas he only has very limited equipment for making synthetic oil seals.

"Mr. Gammie indicated to Mr. Johnson that he had a tentative appointment with Mr. Lane who would discuss the features of the Johnson patent. However, Mr. Johnson indicated no desire to have such a discussion, and there was no opportunity to

(Testimony of Edward Gammie.)

urge upon him that he talk with Mr. Lane because he indicated that he wasn't interested in selling the patent even at \$10,000.00.

"Johnson said he didn't expect to do anything with the patent at the present time but hold it in his portfolio for future reference, depending on developments in the oil seal business.

"Johnson has been in litigation with Chicago Rawhide recently and the National Company has petitioned the [190] Court to interpret or clarify the license agreement under which National and Chicago Rawhide are working. It seems that Johnson is not satisfied with the restrictions that are put upon him with respect to prices, and he has asked for a Court ruling. However, this litigation has now been settled out of court and signed agreements have been entered into by Chicago Rawhide and National. Johnson said that this agreement included a stipulation to the effect that his company would not make special discounts, rebates, etc., to jobbers; that is, the prices they make would be the same as shown in their price list. This, however, would not apply to the Standard oil seals on which there is a special arrangement with the NAPA.

"Mr. Johnson is anxious that prices be restored to the normal relation with car factory prices, claiming that they are not going to make special deals any more and that they will continue to operate their warehouses. He seemed to feel that it would be entirely legal that all the grease retainer manufacturers would base their prices directly on

(Testimony of Edward Gammie.)

car factory prices; that is, that we would give the jobbers on one-lots a price equal to 60% off the car manufacturer's list price. Then on 10-lots and 50-lots prices would be definitely 5% or some other per cent lower. In that way the grease retainer prices would all be alike. I told Johnson that we were not interested in entering into any [191] price agreements and besides I did not think it was legal. He claimed that his attorney said that prices could be so made because the actual base price is determined not by the grease retainer manufacturers but by the car factories. I also pointed out that car factory discount schedules and trade schedules vary and that we thought it necessary to have the form of our price list sufficiently flexible to meet through the jobber, the various prices made by the car factories.

“One of the reasons for Johnson being in the East is to be available as a witness in hearings before the Senate Committee on amendments to the Wagner Act.”

(Signed) “C. C. SECRIST.”

Q. Is that a true and accurate account of the substance of the conversation that you had on that day with Mr. Johnson?

A. Yes, very substantial.

Q. Mr. Lane is referred to in that memorandum. Who is Mr. Lane?

A. Mr. Lane is of the firm of Parkinson & Lane, patent attorneys.

(Testimony of Edward Gammie.)

Q. Did you have an opinion from him or from that firm in regard to Johnson's patent prior to this meeting? A. Yes.

Q. Did that opinion have anything to do with your view of the value of that patent?

A. That decided our action.

Mr. Haight: You may cross-examine.

Cross-Examination

By Mr. Owen:

Q. Mr. Gammie, are you familiar with the B-1175 [192] which is used as a spacer?

A. I am not.

Q. You referred to a meeting in May. You are sure that was not late in April? I note your memorandum dated May 3. Could it have been late in April?

A. It could have been late in April, I presume that it was approximately that date.

Q. You don't know whether it was on Friday, April 28, or Saturday, April 29?

A. Well, it was a week day, I could not say whether it was a Friday or a Saturday.

Mr. Owen: That is all.

Mr. Haight: That is all.

The Court: We will take a recess now until tomorrow morning.

(Thereupon an adjournment was taken until tomorrow, Friday, January 25, 1946, at 10:00 o'clock a.m.) [193]

Friday, January 25, 1946, 10:00 o'Clock A.M.

The Clerk: National Motor Bearing Co. v. Chanslor Lyon.

Mr. Owen: Ready.

Mr. Haight: Ready.

Mr. Owen: Mr. Haight, will you offer the photostats in evidence now?

Mr. Haight: Yes. We have had a copy bound for convenience of the enlarged drawings of certain of the patents referred to, and some that were not referred to by the witness, and I will offer those in evidence as Defendant's Exhibit next in order.

The Court: Very well.

(The photostats of enlarged drawings were marked Defendant's Exhibit AAI.)

Mr. Owen: Mr. Haight and I have also agreed that for the sake of permanency anything that the witness has put on the chart in pencil be made in ink.

ALBERT J. AUKERS

recalled.

Cross-Examination

By Mr. Owen:

Q. Mr. Aukers, your work with the Victor Company makes you familiar with their various catalogs, does it not? A. It does.

Q. Do you identify this catalog No. 301 as a catalog put out [194] by the Victor Company?

A. Yes.

(Testimony of Albert J. Aukers.)

Mr. Owen: I offer that as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(The document was marked Plaintiff's Exhibit 13.)

Q. (By Mr. Owen): Do you also identify this catalog 302 as a similar catalog? A. Yes.

Mr. Owen: I offer it in evidence as Plaintiff's Exhibit 14.

(The document was marked Plaintiff's Exhibit 14.)

Q. You referred yesterday in your testimony to gaskets of all sorts. Does this catalog put out by the Victor Company illustrate the various kinds of gaskets that you referred to? A. Yes.

Q. As well as oil seals?

A. There are oil seal structures in there.

Mr. Owen: I offer that as Plaintiff's Exhibit 15.

(The catalog was marked Plaintiff's Exhibit 15.)

[Plaintiff's Exhibit 15 appears in book of exhibits.]

Q. (By Mr. Owen): Do you have with you a current catalog of the Victor Company similar to any of these that I have offered?

A. I believe they have one on the table, I see one there.

Q. Is that the one with the blue cover?

A. I believe so.

(Testimony of Albert J. Aukers.)

Q. Is this the one to which you refer, No. 303?

A. Yes.

Mr. Owen: I offer that in evidence as Plaintiff's Exhibit 16. [195]

(The document was marked Plaintiff's Exhibit 16.)

Q. (By Mr. Owen): Now, this catalog No. 303 is of the current types of oil seals made by the Victor Company? A. Yes.

Q. By the way, that catalog, in fact, all of these catalogs have pictures. Are you in the pictures in these catalogs, where they show the research lab in the lower right-hand corner of page 3?

A. I am in this picture, yes.

Q. You are in the right-hand upper corner of the picture? A. Yes.

Q. The picture in the lower right-hand corner of page 3? A. Yes.

Q. That picture has appeared in all catalogs beginning about 1937, hasn't it?

A. I have not checked that.

Q. You stated on your direct examination that you called on the trade and are familiar with sales and records of the Victor Company. How many would you say, if you know, approximately, of this type A seal has the Victor Company sold each year, let us start say about 1939. Have you any idea of the approximate production?

A. I have no idea. In my capacity, being field sales engineer at that time. I kept no records of quantity or design in detail.

(Testimony of Albert J. Aukers.)

Q. Have you any idea in any year what the volume of sales of these seals has been by the Victor Company?

A. Of the Victor Company?

Q. Yes.

A. The only remembrance I have was the general statement made to me of the sales in the 1944-45 period of approximately [196] ten or twelve million of all types, sizes and designs.

Q. Have you any idea of the proportion of those as to Type H seal? A. No, I do not.

Q. You do not have the records with you that would show that? A. No.

Q. The Type H seal has been quite extensively used by your customers?

A. Yes, with great success.

Q. You do not have any idea of the dollar volume of business in 1944?

A. No, I am an engineer, I am sorry.

Q. You are also acquainted with the various Victor patents, patents taken out by the Victor Company on oil seals?

A. Well, I do not specialize in patents; my job is product engineer, and I only hear of a patent when the management brings it to my attention.

Q. Do you know how many the Victor Company has in the field of oil seals?

A. How many patents in number?

Q. Yes.

A. I could not hazard a guess, I am sorry.

(Testimony of Albert J. Aukers.)

Q. Would you count the number of patents which are shown on page 1 of Exhibit 16?

A. 46.

Q. That was in 1942, was it not?

A. Yes. The catalog is dated September, 1942.

Q. I have a book here of the Victor patents which has 56 patents in it. Are you willing to accept my statement that there are 56 patents of the Victor Company?

The Court: Of what kind? [197]

Mr. Owen: Of oil seals.

A. I have not looked at it, but I am willing to accept your statement.

Mr. Haight: I am willing to accept the statement but I do not consider it has anything to do with this lawsuit.

Q. (By Mr. Owen): Have you ever seen a copy of this patent of the Victor Company No. 2,145,928?

Mr. Haight: I notice that this patent was applied for July 29, 1936. On what theory is this material?

Mr. Owen: This patent is material because Figures 1 to 5 or 6 show the disclosure of the Type A device.

Mr. Haight: Suppose it does? What has a subsequent patent or any patent of the defendant if it is after, or of the manufacturer who is not a party to do with any issue in this case? That sort of inquiry could go on interminably. If you want any authority that it is immaterial I can furnish it if you will give me about five minutes; if that is

(Testimony of Albert J. Aukers.)

allowed in a patent suit there is no limit to where we will go if we inquire into all of the patents of the manufacturer subsequent to anything in evidence in this case; it could not possibly be material, and I object to it.

The Court: You have some purpose in mind?

Mr. Owen: Yes. All I am going to do is call attention to the two patents of the Victor Company that show the structures that are disclosed in them. That is all I have in mind. [198]

The Court: There is no dispute that—I do not think that the defendant disputes that fact that that is the structure——

Mr. Owen: That is not the question.

The Court: They introduced it in evidence first.

Mr. Owen: That is not the question. The purpose here is to show that they had this construction disclosed in one of their patents which issued on the same date that the patent in suit issued, and then under the rules of the Patent Office, I believe it is Rule 94, they are privileged to come into the Patent Office and ask for an interference, and take away a claim which he got which covers the construction which is also shown in this copending case or patent. It so happens that in the Johnson application, which undoubtedly they got a copy of in the patent office, it shows that his date would beat their date, and they did not ask for any such interference. I think it is relevant on the question of the conducting of these negotiations to which Mr. Gammie testified, and the general relationship be-

(Testimony of Albert J. Aukers.)

tween the Victor Company and the plaintiff as to which there was some testimony yesterday. Certainly it could not do any harm.

The Court: It is not quite clear to me just what the pertinency of that is to the issue of infringement.

Mr. Owen: It is not as to the matter of infringement, it is as to these negotiations, it shows a reason why they did not come in. [199]

The Court: You have some thought that there is some connection between that and the conference that took place in Chicago, or some statement that the record shows that the manufacturer had received a patent the same day that the Johnson patent was issued, and that there was no interference between the two in the Patent Office, there was no interference proceeding in the Patent Office.

Mr. Owen: Coupled with the fact that it formed the basis of an interference.

The Court: Subject to the materiality, do you want to stipulate that is the fact?

Mr. Haight: Your Honor, I hesitate not to stipulate to any fact that may be of value, but when we get into a field that is so utterly immaterial I do not want to stipulate. I object to the evidence as immaterial. There is no question about the structure.

The Court: I asked counsel the purpose and he seems to indicate that he wants this as a fact that might in some way or other affect the weight of the testimony with respect to the conference and dis-

(Testimony of Albert J. Aukers.)

cussions which took place in Chicago at this meeting. That is what he said to me to be his purpose.

Mr. Haight: Maybe it is due to my stupidity, but he has certainly not made it clear to me how we came into the discussion at Chicago, at all. Nobody has mentioned it.

The Court: I take it that he is urging this in support [200] of the testimony of Mr. Johnson—am I correct in that?

Mr. Owen: Yes.

The Court: I think I shall allow it for the limited purpose of throwing whatever light it may throw on that—I am not passing on that now—with respect to the weight of the testimony as to these conversations which took place in Chicago that the witness testified to, and in order to save time, with that ruling, would you stipulate to the fact that I have stated?

Mr. Haight: If it will save time, yes; I will let him put in all of the testimony if he wants to; but as far as the illumination is concerned, if I may quote a phrase from John Milton, “It is all darkness and a void.”

The Court: Subject to the statement that the court made, is that a correct statement of the fact?

Mr. Haight: That is all right, let us go ahead with this witness.

The Court: Is there anything else?

Q. (By Mr. Owen): I just want to ask you if Figures 1, 2, 3, 4, and 5 show a structure having the

(Testimony of Albert J. Aukers.)

inset flange with a sealing member molded to it?

A. You ask me as to all the Figures 1 to 5?

Q. Yes.

A. Well, as I look at it the structures Figure 1 and Figure 4 show a structure similar to Type A.

Q. That is enough, as long as I have one. [201]

Mr. Owen: I offer that as Plaintiff's Exhibit 17.

(Patent 2,145,928 is marked Plaintiff's Exhibit 17.)

[Plaintiff's Exhibit 17 appears in book of exhibits.]

Q. (By Mr. Owen): There is just one more patent of the Victor Manufacturing Company that I would like to call attention to, and that is No. 2,240,332, granted April 29, 1941. That patent is similar to your Type H seal?

Mr. Haight: Let me see what the date of it is. What is the date of it?

Mr. Owen: January, 1939.

Mr. Haight: How is that material?

Mr. Owen: That is material on this phase. In its answer one of the defenses is that there was no invention here in view of the state of the art. I want to show by means of this patent and by means of the statements made by the Victor Company to the Patent Office which resulted in the granting of this patent that they took there a position that it was invention, and here they are telling the court that it was no invention; in other words, they are taking inconsistent positions, in one place to convince the Patent Office so they could

(Testimony of Albert J. Aukers.)

get a patent, and here so that they can convince the Court there was no invention in what they argued was invention there.

The Court: Do you object to this?

Mr. Haight: I certainly object to it.

The Court: I think the objection is good.

Mr. Haight: That conversation in Chicago was not in 1936, [202] that was in 1939, and you will remember the evidence yesterday that we were putting these on the market, not the defendant, but the manufacturer was putting them on the market prior to the application date of the patent in suit. That goes back to 1936. The conversation was in 1939.

Mr. Owen: Your Honor, along with the offer of that patent I also want the record to show that I wish to offer the file wrapper, which shows the argument put up by the Victor Manufacturing Company to convince the Patent Office to grant that patent, so that my exception will also include an offer of the patent and the file wrapper.

The Court: You may have the file wrapper marked and the patent marked for identification if you wish to show what you offered.

Mr. Haight: I object to that also, that has been thoroughly passed upon by the Supreme Court, and there is no such thing as invention in a patent by estoppel. That has been repeatedly ruled upon by the Supreme Court.

(The patent No. 2,240,332 is marked Plaintiff's Exhibit 18 for Identification, and the File Wrapper Plaintiff's Exhibit 19 for Identification.)

(Testimony of Albert J. Aukers.)

Q. (By Mr. Owen): Now, Mr. Aukers, I want to refer to the patent in suit and to the way in which a sealing member of that sort is made. It is true, is it not, that looking, for instance, at Fig. 5, you take the male member which you have colored red, which is the cup member, and you have a female mold into which that is inserted, is that correct? A. That is right.

Q. And then you place into the mold a sufficient amount of composition so that when the male member of that mold is squeezed down on it and the mold defines the shape of the sealing member, there is just the right amount of composition in there to fill the mold?

A. No, it is not right in the fact that you have a little more than the right amount.

Q. So that it will squeeze out through the edge for the beginning operation? A. Yes.

Q. Generally speaking, the perfect operation will be to fill it exactly right?

A. That would be the ideal one.

Q. Then the male member is closed on the mold and it is put into a hydraulic press, which is the type of presses that are shown in the lower right-hand corner of the page of the catalog Exhibit 16?

A. That is the type of press in which the molding operation is done.

Q. Then as a result of that curing in a mold under the heat and pressure the composition that was put in there in an uncured state assumes a

(Testimony of Albert J. Aukers.)

definite form and consistency and secures itself to the cup member. That is correct, is it not?

A. It is not.

Q. What is incorrect about it?

A. The fact of the matter is the molding of the two members does not secure a bond to the inwardly offset radial flange. Preparation of the [204] flange is necessary.

Q. With that correction, that is right?

A. Yes.

Q. That is true also in the device that would be secured in a mold in a similar way in Pennick?

A. It would.

Q. That is also true of Frumweller, that would be secured in the mold, too, wouldn't it, in a similar way?

A. It would.

Q. That is also true in the case of Miller, 2,004,669, in Figure 5?

A. Figure 5 and Figure 7 as well.

Q. Now, all of the other patents to which you referred yesterday, of which Fitzgerald is an illustration, No. 1,983,746, rely upon a vise-like mechanical clamp with the possible exception of your Peterson patent, that is correct, is it not?

A. The bonding is obtained by the clamping between the radial faces.

Q. What you have called a bond here in your testimony?

A. Yes.

Q. It is a physical manipulation of clamping like a vise? It is a bonding between the two mechanical case members, they are squeezed together

(Testimony of Albert J. Aukers.)

and they hold the leather sealing element, or it may be a synthetic sealing element?

A. That is the method of bonding.

Q. In the Peterson patent in the Figure down here that union is made there with cement, in other words the sealing element which is made?

A. The synthetic sealing element is made separate in one mold, it is united with the case separately, in an entirely separate operation. [205]

Q. Mr. Aukers, in all of this maze of prior art to which you have referred yesterday, what do you consider to be your single best reference?

A. I have looked through the patents that I testified to yesterday, and I cannot truthfully give you any single one. Comparing these in my mind with the Johnson patent, I looked at the Gits, and that is definitely a good one; I looked at the Chandler, and that is a good one; I looked at the Winter, and that is a good one, and here is Fitzgerald.

Q. What other ones would you like to include?

Mr. Haight: Before this line of interrogation goes too far, I have not offered this witness as an expert. I have my own idea on these references. I called this witness to describe the structure, and I don't know whether I am going to agree with his answers, or not. I do not consider him competent to pass upon the question of which is the best reference. If counsel wants to interrogate him, all right, but I am just cautioning you it does not mean very much to me. He is not that type of witness.

(Testimony of Albert J. Aukers.)

Q. (By Mr. Owen): Have you any others?

A. Did I mention Fitzgerald?

Q. Yes, you mentioned him, Gits, Fitzgerald, Winter and Chandler.

A. Frumweller, and you also had Heinze.

Q. Which Heinze? A. 403.

Q. That is 2,071,403?

A. Yes. Lord, Anderson, and Heinze [206] 2,116,240. I believe those are all that I remember.

The Court: We will take a brief recess.

(Recess.)

Q. (By Mr. Owen): Mr. Aukers, in your testimony yesterday you said that Pennick, 1,817,095, shows the sealing member bonded to both sides of the projection 11' in Figure 2 and to the projection 11 or 10 in Figure 1, is that correct?

A. 11 and 10 in Figure 1, are equivalent to 11' as shown in Figure 2. That is the molded resilient member.

Q. It is bonded to both sides of it? A. Yes.

Q. That is true also of Miller, is it not, 2,004,669, Figure 5, that is bonded to both sides?

A. Yes.

Q. So that in that particular Miller is like Pennick? A. Well. Pennick—

Q. Answer my question "Yes" or "No" and then you can explain. A. Yes.

Q. Now, I call your attention to Frumweller 1,617,587, which you have colored Figure 5, that shows the sealing member bonded to both sides of the flange similar to Pennick, is that correct?

A. Yes.

(Testimony of Albert J. Aukers.)

Q. Did you know that the Patent Office cited this Pennick reference before it granted the patent in suit? A. I don't know what you mean.

Q. Did you know that the Patent Office cited this Pennick patent as a reference before they granted the patent in suit? [207] A. No.

Q. Now, I call your attention to the Chandler patent No. 1,905,800; that has the radial offset cup flange 18, doesn't it?

A. It has an axially inward offset radial flange 18.

Q. And the operation of the Chandler seal is to clamp the leather or synthetic sealing member in a little groove or pocket by means of a physical device, a locking action of the parts; that is correct, is it not? A. The operation——

Q. Will you please answer "Yes" or "No?"

A. Yes. However, the operation is one of bonding by clamping.

Q. You prefer to call it bonding, it does not matter what you call it, the fact is that it is gripped in there with a vise-like action, isn't that right?

A. Yes.

Q. Now, in the patent in suit, let us look here at Figure 5. The case member has the peripheral portion and the inwardly offset flange, and that is similar to the case member of Figure 3 of the Chandler patent in that regard, is it? A. Yes.

Q. And looking at Figure 3, that case member there has the peripheral portion and the radial inset flange similar to Chandler, that is correct, is it not? A. Axially, yes.

(Testimony of Albert J. Aukers.)

Q. Now, you said that Fitzgerald was another illustration of the offset flange. I call your attention to Figure 1, where you have the case with the peripheral portion and the inwardly offset flange; that is similar to the one in Chandler, [208] Figure 3, is it not?

A. Yes, both of them have axially inwardly offset radial flanges.

Q. Now, in Frumweller, I call your attention to the portion marked 45, which you have colored red, and while that is not a radial flange it is an offset axial flange, is it not?

A. No, that is an inclined flange looking at the view from Figure 1, in the way I look at it it is an inclined flange connecting axial portions of the flange.

Q. And it has a similar shape to the flange in Figure 3 of Chandler, does it not? A. Yes.

Q. So in that particular Chandler and Frumweller are alike?

A. In that particular, yes.

Q. Now, in the prior art patent to Larsh, 2,000,341 in Figure 3 you find the radial flange with a setoff portion, isn't that correct?

A. That is right, it is a radial flange with an offset portion connected by an inclined plane.

Q. That is also true in Figure 7?

A. With the offset radial flange connected by an inclined plane.

Q. In that regard they are similar to Figure 3 as to inwardly set flange portion of Figure 3 of Chandler? A. Yes.

(Testimony of Albert J. Aukers.)

Q. I call your attention to the Anderson patent, which shows a method of producing oil seals and in describing that method they also show an oil seal between these extended guides, which, as I believe you said, was an inwardly offset—

A. Axially inwardly offset radial flange. [209]

Q. And in that respect that is similar to Figure 3 of Chandler? A. Yes.

Q. Now, referring to Heinze No. 2,071,403, I believe you found in the disclosure of that patent an inwardly offset flange? A. Yes.

Q. And that is similar, then, to Figure 3 of the Chandler patent? A. Yes.

Q. Now, the Winter patent, No. 2,089,461, I believe you gave that as another illustration of an inwardly offset flange?

A. Figure 5 has the axial inwardly offset radial flange.

Q. That is similar to Figure 3 of Chandler, is that correct? A. Yes.

Q. Now, I call your attention to Figure 5 of the Peterson patent, No. 2,114,908, and there you have given a case member with a peripheral portion and an inwardly offset radial flange?

A. Yes.

Q. That is similar to Figure 3 of the Chandler Patent? A. Yes.

Q. Now, yesterday you referred to the Heinze patent No. 2,116,240, and particularly to Figures 3, 6, 7, and 13. Would you look there and see if you find in Figures 3, 6, 7, and 13 the cup member with

(Testimony of Albert J. Aukers.)

its peripheral portion and its inwardly offset radial flange? A. I do.

Q. That is similar to the Chandler Figure 3?

A. Yes.

Q. Do you know whether or not this Chandler patent was cited [210] by the Patent Office before granting the patent in suit?

A. No, I do not.

Q. Now, I want to take up this Frumweller Patent, 1,617,587. The patent shows here as I believe you said a face type of seal pressing the seal against the cylindrical face of the ball?

A. It does.

Q. In that type of seal the member 48 pushes the seal, itself, axially along the longitudinally long shaft, doesn't it? A. That is correct.

Q. In this Frumweller construction the resilient member, which you read, as an annular flexible diaphragm, that is the part which is 43——

A. (Interrupting): There are two resilient members in Figure 5.

Q. I am talking about the one you read from the claim that is called annular flexible diaphragm, that is 43? A. That is right.

Q. That is anchored in this housing at its outer edge so that with the pressure of the spring pushing axially along the shaft it shoves this sealing member against the ball? A. That is correct.

Q. Now, then, would you apply an arrow in the direction of that force which is applied? I will give you a colored pencil.

(Testimony of Albert J. Aukers.)

A. The force is applied longitudinally.

Q. Will you put that right out in the ball so it will show that is the direction of the sealing member against that ball? [211]

A. This is the direction of the spring pressure against the steel diaphragm which presses the sealing member against the ball.

Q. Now, in giving your definition yesterday of your color scheme you said that you used blue, I think it was, for the resilient rubber sealing member, whether rubber or leather. That is correct, is it not?

A. I identified it as Item 41.

Q. 41? A. Yes.

Q. It is all colored blue?

A. That is right.

Q. Now, why was it that you extended that blue color and took in the seal 46 that is around the outside of that resilient sealing member? Do you know what 46 is?

A. 46 is the metal sheath as is described in reading the patent specifications.

Q. That is not flexible, is it?

A. It, in itself, is not.

Q. It is a cylindrical metal member?

A. Yes.

Q. Why did you color it blue, then, and not red, like you colored the other portion?

A. The only answer to that that I can say is, I am not concerned with the resilient member, and thought that the description from the specifications would explain 46 satisfactorily.

(Testimony of Albert J. Aukers.)

Q. You did not illustrate it correctly, did you, with the color as far as the color is concerned?

A. No, but I did not think it had any pertinency on the bonding that I was showing.

Q. Do you mind correcting this drawing so it conforms to the [212] facts by just writing off to the right, "Metal sheath should be colored red?"

A. Yes.

Q. Now, the operation of this Frumweller device as shown in Fig. 5 is that the periphery is a longitudinal periphery and it is forcing the sealing material 41, which is inside of the metal sheath 46, so it cannot flex against the ball face 3. That is correct, is it not?

A. The explanation is incorrect to one extent, and that is though 41 cannot flex it can be displaced upon the periphery longitudinally.

Q. Depending upon how heavy and thick rubber it is, and the composition of the material entirely?

A. The pressure would make it displace.

Q. But in the operation of the device, in the normal operation of the device there would be in view of the sheath of 46 there would be no flexing of the sealing member 41 with relation to the flange to which it is attached?

A. No, it would be longitudinal.

Q. Now, you testified yesterday, in talking about this Frumweller reference, that that could be used to seal a shaft. Do you remember that testimony?

A. That it could be used to seal a shaft—I don't remember whether I said that.

(Testimony of Albert J. Aukers.)

Q. You said instead of a ball member? Would you just show us how you are going to reconstruct from Frumweller to make the seal as shown in Figure 4?

A. You would have to rotate the structure 90 degrees and then you would have a structure [213] such as this.

Q. What you are doing then is taking the resilient member 43 and *being* it over to form a peripheral portion of it?

A. That is right, and you have an outer peripheral portion, the cup bottom, axially inclined portion and radial portion, here. This is the inclined portion and then, of course, the molded resilient material is bonded to both sides of the radial portion and inclined plane.

Q. Then you are taking off that 46, aren't you?

A. I am.

Q. You do not want it. What are you going to provide in the way of a spring to keep that from pressing on the shaft?

A. That has a good deal of spring.

Q. So you would have to reconstruct the ball to make it a shaft?

A. No, only change the axis.

Q. More than that, you have provided additional parts, haven't you?

A. No, I mentioned in the beginning that by rotating it 90 degrees, then having the metal portion here, it will become a periphery portion, and having this base it would become a cup bottom, and

(Testimony of Albert J. Aukers.)

this portion would become an inclined plane, and then the radial portion, and then all we do is take the sealing element and bond it to both sides of the radial flange. That, in itself, could be a seal.

Q. Then when this has been reconstructed you would put the seals now on the shaft instead of just straight along the axis of the shaft, that is correct, is it not?

A. Not necessarily. [214] As I see it, the force of the sealing element is 90 degrees, that is the only difference, you see you put the seals along the same face as you have in the longitudinal curve, in other words in rotating it you put it on the shaft, and it would just be the curve that you see here, the shaft would be in this direction.

Q. You have just shown a representation of a shaft there.

A. That is a representation of a shaft, so you still deal with the same phase of the construction shown in Figure 5, and you rotate it at 90 degrees.

Q. But as shown in this patent it would not be operative with these changes to seal the shaft?

A. It would be operative.

Q. With the changes that you have made to seal the shaft?

A. You could have it sealed both ways, but I would prefer the change; I am explaining, I could visualize a shaft on this having an extension.

Q. You are drawing now a shaft right through the middle of Figure 4?

(Testimony of Albert J. Aukers.)

A. Right through the middle of Figure 4, and part of the shaft is a conical job, a round job, as shown here, and the sealing element of the seal on the inclined plane of the rotated shaft.

Q. Then you are going to amputate this ball 3 as part of the shaft and have a special shaft made to fit the seal, is that correct?

A. In this instance, yes, though you could have both [215] types of shaft with the same basic design as Figure 5.

Q. Now, this device of Lord, No. 1,996,210, is for a vibration mounting member, is it not?

A. That is correct.

Q. That is not an oil seal?

A. It is not an oil seal.

Q. Nor is it an air seal?

A. It is not an air seal.

Q. It would have to be changed and reconstructed if you were going to make an oil seal out of it, wouldn't it?

A. It would.

Q. The Victor Manufacturing Gasket Company does not manufacture this device of the Lord patent, does it?

A. We do not.

Q. Does the plaintiff manufacture any such device?

A. Who is the plaintiff?

Q. The National Motor Bearing Company.

A. I don't know.

Q. No oil seal manufacturer that you know of does make these devices, does he?

A. I could not answer that, I have not investigated that phase of it.

(Testimony of Albert J. Aukers.)

Q. The device of this Peterson patent No. 2,114,-908, which is owned by the company for whom you work, has never been sold commercially, Figure 5?

A. Not to my knowledge.

Mr. Owen: That is all.

Mr. Haight: There is no redirect examination, if your Honor please. As far as I am aware, that is the close of the defense. [216]

LLOYD A. JOHNSON

recalled as a witness by Plaintiff in rebuttal, having been previously sworn, testified as follows:

Direct Examination in Rebuttal

By Mr. Owen:

Q. Mr. Johnson, have you studied the various patents which are cited by the defendants in this case?

A. Yes.

Q. Are you familiar with those constructions?

A. Yes.

Q. Have you ever given testimony before in a patent case involving oil seals?

A. Yes.

Q. Whereabouts?

A. In New York and San Francisco.

Q. When was the New York case?

A. 1935, I believe.

Q. When was the case here in San Francisco?

A. About two years ago.

Q. Do you remember what judge it was before?

(Testimony of Lloyd A. Johnson.)

A. I am sorry, I can't remember his name; it was a Federal judge.

Q. Was it Judge Roche? A. Yes.

Q. I believe you were asked on cross-examination about the date when you made the invention of the patent in suit. Do you have anything to show or refresh your recollection as to when you invented the seal in suit? A. Yes.

Q. What do you have there, Mr. Johnson?

A. I have a blueprint.

Q. What does it show?

A. It was drawn on May 23, 1935 by Hall H. Klein.

Q. Who was he?

A. He was our testing engineer at the time this drawing was made.

Q. Did you have anything to do with the making of that drawing? [217] A. Yes.

Q. What did you have to do with it?

A. I had previously made a sketch of this seal in question and instructed Mr. Klein to make a sketch of it, and then supervise the testing of the seal.

Q. Do you have the original tracing from which that blueprint was made? A. No.

Q. Do you know where it is? A. No.

Q. Where did this blueprint come from, do you know?

A. It came from your office, I guess. We sent it to you.

Q. Do you know when it was sent to me?

(Testimony of Lloyd A. Johnson.)

A. It was received by you on September 13, 1935.

Mr. Owen: Mr. Haight, if I were called as a witness I would so testify, it has my office date stamp on it.

Mr. Haight: All right.

Q. (By Mr. Owen): What is the construction shown on that blueprint?

A. It is similar to Figure 5 of patent 2,146,677.

Q. That is the device in suit? A. Yes.

Mr. Owen: I ask that the blueprint be marked Plaintiff's Exhibit next in order.

Mr. Haight: Will you reserve offering it until I have an opportunity of interrogating him?

Mr. Owen: I will ask that it be marked for identification.

(The blueprint is marked Plaintiff's Exhibit 20 for Identification.)

Q. (By Mr. Owen): Following the making of that sketch what else [218] was done in regard to that seal, if anything?

A. Well, we made the seal and tested it.

Q. Were any drawings made in the factory?

A. Oh, yes.

Q. Do you have any of those?

A. Yes, I have four here.

Q. What are these?

A. These are original drawings of the same type of seal as shown in Figure 5, which is Drawing EX314.

Q. What is the date on that drawing EX314?

(Testimony of Lloyd A. Johnson.)

A. August 13, 1935. Then there are three more drawings; two of them, EX315, EX316, are mold drawings, and EX317 is the outer case drawing, which is similar to the outer case shown on Figure 5. These are blueprints of those drawings.

Q. Where did these tracings, the originals of which are in your hand, come from?

A. Out of the engineering files of the National Motor Bearing Company.

Q. Do you know when they were taken out?

A. Just recently, in the last ten days, or so.

Q. For the purpose of this case? A. Yes.

Q. Are those files regularly kept by the National Motor Bearing Company? A. Yes.

Q. What is the date on the mold drawings EX315 and 316?

A. August 21, 1935, on both of them.

Q. Were molds actually made and was a seal made according to those drawings? A. Yes.

Q. Do you have it? A. Yes.

Q. Would you please produce it?

A. Here is the seal. [219]

Q. What is that seal like, which drawing?

A. Drawing EX314.

Q. That is an assembly drawing? A. Yes.

Q. Wherein does it differ from that drawing EX314?

A. I don't know that it differs, except that the outer case on the edge of the outer case, near the wiping lip, it has no coil spring. Otherwise it is the same.

(Testimony of Lloyd A. Johnson.)

Q. That does not affect the operation?

A. No.

Q. What are the facts about the making of that seal?
A. This seal was made and tested.

Q. Have you any data there that shows when it was made or tested? What are you reading?

A. I have a tag that has been attached to the seal ever since the test.

Q. What does it say on the back?

A. Metal Heel Hermetik subjected to continuous testing from 9-9-35 to 10-7-35. It is also dated 10-7-35. On the other side of the tag it says, "See Test report #109 for details."

Q. With respect to that date of 10-7-35 in the upper left-hand corner of the tag, what does that indicate?

A. That indicates the conclusion of the test.

Q. And on the other side of the tag about the Test #109, were you able to find that test?

A. No, I was not.

Q. Are you able to account for why you could not find it?

A. This test report, along with quite a few others, has been lost in the moving, when we lost a lot of other samples. [220]

Q. Your testimony the other day was that you had made quite a few of these sample seals. How many of those were you able to find when I asked you to look for them recently?

A. You mean of this particular type of seal?

Q. Of this particular seal right here, made

(Testimony of Lloyd A. Johnson.)

according to this drawing EX314. A. One.

Q. And do I have a copy, I mean one like it, in my office? A. Yes.

Q. I hand you a seal with a tag on it which shows with a rubber stamp, "From Law Office of A. Donham Owen, Patent, Trade-Mark, Unfair Competition and Copyright Exclusively, 950 Russ Building, San Francisco, Received September 27, 1935," and alongside of it are my initials, which I put there on that date. On the tag of the seal can you read that and tell whose handwriting that is on the back of that tag?

A. It is dated 9/26/1935, "Sample for Mr. Owen. Metal case Hermetik Soft lip molded or bonded metal case or heel."

Q. Was that seal made in the same mold and at the same time as the one which you previously made? A. Yes, with the same tool.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 21, the seal about which Mr. Johnson testified, and as Exhibit 22 the one which was in my office.

Mr. Haight: I suppose they are admissible.

(The seals were marked Plaintiff's Exhibits 21 and 22 in evidence.) [221]

Q. (By Mr. Owen): Now, Mr. Johnson, I want to call your attention to Exhibit 20 for Identification and to the statements appearing on there and ask you to explain what they mean. First, read the statements on there and explain them.

A. "New type Hermetik metal ring heel."

(Testimony of Lloyd A. Johnson.)

Q. The statements I am interested in are those two last lines.

A. "First seal of this type made 9/28/35. First installed in machine 9/4/35."

Q. According to that statement you are installing them in a machine 24 days ahead of having made the first one. How do you explain that, and I hand you back the seal which you have produced with the tag on it.

A. The only logical explanation I have of this conflict of dates is the fact that Mr. Klein evidently wrote the figure "9" for September when he should have written August. The seal, itself, with the tag that has been on it, is dated 9/4/35, at the beginning of the test, so obviously it had to be made before it could be tested. The lapse of time of six to seven days between August 28 and the day the seal was first tested is about the time it took to make the seal.

Q. Referring to the date on the molds that were used in making that seal, does that give you any clue?

A. Yes, the mold drawings are August 21.

Q. And about how long would it take to have those molds made?

A. A day. [222]

Q. About how long?

A. One day.

Q. You testified the molds were so made.

A. Yes.

Mr. Owen: Mr. Haight, are you agreeable to using blueprints for these originals?

Mr. Haight: Certainly.

(Testimony of Lloyd A. Johnson.)

Mr. Owen: I will offer as Plaintiff's Exhibit 23 the four blueprints No. EX314, dated August 13, 1935, EX315, dated August 21, 1935, EX316, dated August 25, 1936, and EX317 dated 8/13/35, all to constitute one exhibit.

(The blueprints were marked Plaintiff's Exhibit 23.)

[Plaintiff's Exhibit 23 appears in book of exhibits.]

Mr. Owen: Now, Mr. Haight, how about Exhibit 20 for Identification?

Mr. Haight: I think you had better offer it.

Mr. Owen: All right.

The Court: It may be admitted.

(Plaintiff's Exhibit 20 for Identification was admitted in evidence.)

[Plaintiff's Exhibit 20 appears in book of exhibits.]

Mr. Owen: Reference was made yesterday to the Chicago conversations that you had, one of which I believe was attended by Mr. Gammie.

A. Yes.

Q. He said he invited you to go and talk with Mr. Lane, who was the Victor Manufacturing Company patent counsel. Did you go and talk to Mr. Lane?

A. No.

Q. Why did you not?

A. The conversations I had with the men of the Victor organization in negotiating with them indi-

(Testimony of Lloyd A. Johnson.)

ated [223] that they wished to depreciate this patent of ours, and I felt by talking to their attorney would only subject me to more hammering down on the patent, and I saw no purpose in going to see him.

Q. I believe you testified you had come down on your royalty from 5 per cent to 2 per cent.

A. That is right.

Q. Now, as Mr. Aukers used the word "bonding" in his testimony yesterday and today, is that the way the word is used in the oil seal art?

A. No—with respect to certain of these patents, it is with some.

Q. Now, with respect to Pennick, Frumweller and Miller, and the patent in suit, that is the correct use of the word bond? A. Yes.

Q. In the other patents to which Mr. Aukers has referred, where he called it bonding, is that word used in any of those patents? A. No.

Q. How is it referred to in the art?

A. I have a book of patents, here, and I could call them off if you wanted me to.

Q. Where you have devices like the Chandler patent No. 1,905,800, what type of connection is that called?

A. In the nomenclature of the oil seal business that is usually referred to as clamping, that is the machanic's term to distinguish between a clamping and bonding. In our company we make quite a few types of seals where the seal members are held by clamping. [224]

(Testimony of Lloyd A. Johnson.)

Q. In getting out your patent before the Patent Office did you have anything to say to the Patent Office about this matter of bonding? A. Yes.

Q. Will you read what you said?

A. "The Pennick reference is of no greater value than Walker as showing that bonding is not new. As before stated, the basis on which the present case rests is believed to be one of structure of the various parts entering into the seal."

Mr. Haight: What page are you reading from?

A. Page 17.

Mr. Owen: Page 17 of the File Wrapper, which is Defendant's Exhibit AAA.

The Court: We will take a recess until two p.m.

(A recess was taken until two o'clock p.m.)

Afternoon Session

Friday, January 25, 1946, 2:00 P.M.

The Court: You may proceed.

Mr. Owen: We seem to be hurrying and we will try to finish this afternoon as Mr. Haight can make his train tomorrow.

LLOYD A. JOHNSON

recalled: previously sworn.

Direct Examination

(Resumed)

By Mr. Owen:

Q. Mr. Johnson, you stated in your examination this morning that the Exhibit 21, the seal which

No. 11631

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL MOTOR BEARING CO., INC., a
Corporation,
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vs.

CHANSLOR & LYON CO., a Corporation,
Appellee.

Transcript of Record
In Three Volumes
Volume II
Pages 241 to 509

Upon Appeal from the District Court of the United States
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FILED
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Southern Division

(Testimony of Lloyd A. Johnson.)

you testified was tested in your plant. How was that test concluded? Was it satisfactory or not?

A. Yes, it was.

Q. Does your company have, or do you have maintained a file of patents issued on oil seals adapted for insertion to seal the annular space between the shaft and the bore in the housing?

A. Yes.

Q. Are those files kept under your direction?

A. Yes.

Q. Have you recently examined those files?

A. Yes.

Q. Where did you do that?

A. Well, in my office and in your office.

Q. About how many patents are there on oil seals for insertion to seal the annular space between the shaft and a bore in the [226] housing?

A. Over a thousand.

Q. Did you examine each of those patents?

A. Yes.

Q. About how many of those patents in that thousand are being used commercially today?

A. Approximately twenty.

Q. Among those twenty patents is there any patent covering a unitary, synthetic, rubber, bonded seal construction?

Mr. Haight: I object to that, if the Court please. That is much too general. We ought to deal with specificities on a question like that.

Mr. Owen: He can cross-examine.

Mr. Haight: Of course I can cross-examine, but

(Testimony of Lloyd A. Johnson.)

if you have anything specific you should call attention to it.

Mr. Owen: I will ask another question.

The Court: Very well.

Q. (By Mr. Owen): Besides the patent in suit, do you find among those twenty patents any patents covering unitary synthetic rubber bonded seal construction? A. Yes.

Q. What patent was that?

A. The patent to Heinze, No. 2,240,332.

Q. Are those the two patents you found among the twenty that are being used commercially of that description? A. Yes.

Mr. Owen: I would like to offer in evidence this patent as plaintiff's exhibit next in number.

Mr. Haight: This is a patent applied for in 1939 and issued in 1941. I shall cross-examine him upon the claim of it. [227] I will go into it. Let it be admitted.

The Court: Very well.

(Patent marked Plaintiff's Exhibit No. 24.)

[Plaintiff's Exhibit 24 appears in book of exhibits.]

Q. (By Mr. Owen): Was the patent in suit which is earlier in date than this Exhibit 24, the first commercially successful unitary synthetic rubber bonded seal construction? A. Yes.

Q. Are you acquainted with the patents of the Victor Manufacturing and Gasket Company?

A. Some of them.

(Testimony of Lloyd A. Johnson.)

Q. Do you know how many patents they have on oil seal construction?

Mr. Haight: I object to that as utterly immaterial to any issue in this case.

Mr. Owen: Mr. Haight, let me say what I am trying to prove and maybe we can agree. It was according to our books there were about fifty-six patents for oil seals for this type of sealing. Of those they are using about four in their commercial practice. That is our purpose.

Mr. Haight: Do you want me to admit for purposes of this case they are invalid? If so, I will admit that.

Mr. Owen: I am not asking for that.

The Court: You won't stipulate to the statement made by Mr. Owen?

Mr. Haight: I don't know whether it is true or not, but I will let it go in on that basis.

The Court: Very well. [228]

Mr. Owen: What we are trying to state that on these oil seals it is rarely you get a happy combination that works. There are over a thousand patents in the art and yet very few are actually successful, a commercial success.

Q. To your knowledge has the Type H and the Type A device of the defendant had a substantial and large commercial success? A. Yes.

Q. Mr. Johnson, will you turn to the patent to Gits, 2,052,762? Have you read and do you understand that patent? A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. Have you also read the depositions that were taken in the East in connection with that patent?

A. Yes.

Q. In that Gits structure the sealing member, which is number 5 in Figure 2, is that vulcanized before insertion in the cup member? A. Yes.

Q. That is a separate operation? A. Yes.

Q. And then is that sealing flange brought to another station for assembly? A. Yes.

Q. And how is that sealing flange held in the cup?

A. The sealing flange is placed in the cup, 1, at the recess corresponding to the larger diameter of the sealing flange. Then ring 12 is inserted as shown in Figure 1 and then expanded against the edges of the outer case. In other words, the ring is stretched outwardly to pinch the sealing flange against the outer edge.

Q. In the oil seal there is what kind of hold? What is that [229] called?

A. We call that a clamping action.

Q. Is the device described in the Gits patent like the device described in the Johnson patent in suit where the composition is bonded to the cup member by vulcanization in a single operation?

A. No.

Q. In this Gits structure, this flange 8, does that lay against this inset flange 4? A. Yes.

Q. Is it held against there in any way when it is assembled? A. No.

(Testimony of Lloyd A. Johnson.)

Q. Is there any flange on the back side of that or any flange on the sealing member on the back side of the inset flange 4? A. No.

Q. Was this Gits seal a commercial success?

A. It was a failure.

Mr. Haight: I move all of those answers to each of those questions be stricken as conclusions in answer to leading questions.

The Court: Then you should have objected on the ground that the questions were leading before the witness answered. If he answers the question, it may be that there is a question of the weight of the evidence; but having once come in without objection, I don't think that is a proper ground to make a motion like that at this time.

Mr. Haight: I think your Honor is right.

The Court: I will deny the motion. [230]

Mr. Haight: On the question of weight, such questions and such answers can't have any weight.

Mr. Owen: Mr. Haight, they are no more leading than your questions to Mr. Aukers. The record will show that.

Q. Do you find in the Peterson patent, No. 2,114,908, the structure of the patent in suit?

Mr. Haight: I object to that question on the ground it is calling for the conclusion of this witness, which witness is offered as a patent expert, and I move it be stricken.

The Court: Are you going to pursue it further?

Mr. Owen: Yes, I am.

(Testimony of Lloyd A. Johnson.)

The Court: Counsel is going to pursue it further. The question is harmless, then.

Mr. Owen: What we are doing here is not presenting a matter for a patent expert. He is simply comparing structures, as I understand it.

Q. Do you find in Peterson, in Figure No. 5, the same kind of a cup member as in the Chandler patent?

Mr. Haight: I object to that as calling for a comparison and a conclusion.

The Court: Why don't you ask him, Mr. Owen, if there are any differences, and if so, to state them. Wouldn't that be a fair question?

Mr. Owen: I understand it is perfectly proper and important; that it is necessary to explain the patents for both [231] parties, admitting and identifying similarities between the prior art.

The Court: I think that perhaps the question does call for the conclusion of the witness. With my meager knowledge I am supposed to arrive at the conclusion that you are asking of the witness, but it would be better to ask him the details, or if you can, by a general question ask if they are the same, and if so, stating, or state the particulars in which they are different and let me endeavor to draw the conclusion as to whether they are the same or different.

Mr. Owen: Thank you, your Honor.

Q. Referring to this Peterson patent and comparing it with a Chandler patent, No. 1,905,800, Fig-

(Testimony of Lloyd A. Johnson.)

ure 5 of the Peterson patent, is that the same or different than the construction shown there?

A. The face is substantially the same. It has a periphery. It has a radial flange offset axially just like the Chandler patent.

Q. Was this Peterson patent a commercial success. A. No.

Q. And now, the Chandler patent, No. 1,905,800; do you find in there the structure of the Johnson patent in suit? A. Part of it.

Q. What do you find?

A. I find the outer case member, the radial flange with an axially offset portion.

Q. Is that all you find there of the patent in suit—— [232]

A. There is a sealing member.

Q. Is that like it is in the patent in suit?

A. No.

Q. How is the sealing member held in the Chandler patent?

A. This one is clamped into place between the axial inwardly offset flange and the outer case.

Q. Will you turn to the next patent? This is the patent to Winter, No. 2,089,461; do you find in that patent all or part of the structure of the patent in suit? A. Part of the patent in suit.

Q. What do you find?

A. It has the outer case member; it has the metal radius, I mean, radial flange with an axially offset member, several of them, in fact, and it has

(Testimony of Lloyd A. Johnson.)

a sealing member which is clamped between two axial members.

Q. Is that sealing member secured as it is in the patent in suit? A. No.

Q. Before you leave Winter, is that case, with the peripheral flange and the radial flange the offset portion alike, or substantially different from the Figure 3 of Chandler?

A. It is quite similar.

Q. Will you turn to the next patent? Is Fitzgerald alike, or substantially like the patent you have been talking about to Winter or Chandler?

A. Yes.

Q. Would your testimony be the same with regard to that patent as the others you have been talking about?

A. Substantially the same. [233]

Q. Now, this morning, Mr. Aukers, on cross-examination proposed a reconstruction of this Frumveller seal in order to make it a seal on a shaft. Do you find from your examination of the Frumveller specifications any instructions in there to reconstruct the seal as he proposed? A. No.

Q. Did the Frumveller seal, which is—withdraw that. What type of seal would you call that Frumveller seal?

A. I would say this falls in the classification in what is known as a face seal.

Q. As distinguished from what?

A. As distinguished from a shaft seal.

Q. And the patent in suit deals with what?

(Testimony of Lloyd A. Johnson.)

A. The patent in suit deals with a shaft seal.

Q. Would the seal on this Frumveller patent, Figure 4, used with a ball on the shaft as Mr. Aukers proposed, be a shaft seal or a face seal?

A. It would be a face seal.

Mr. Owen: Would you read the question to the witness, please.

Mr. Haight: The witness made the wrong answer.

(Question read.)

A. I missed this Mr. Aukers' proposition.

Q. (By Mr. Owen): Which would it be?

A. As Mr. Aukers suggested in the revision and redrawing of this patent, it would be a shaft seal.

Q. Are you referring to the sketch he made above Figure 4 there? [234] A. Yes.

Q. He made a second proposal that you place a shaft right through the middle of it and take that ball 3 and incorporate that as part of the shaft. In that case where the ball would rotate with the shaft, what type of a seal would Frumveller be?

A. A face seal.

Q. Do you find in the Frumveller patent an oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in the housing? A. No.

Q. How is the Frumveller held in?

A. This is clamped between two parts of what

(Testimony of Lloyd A. Johnson.)

appears to be the housing. It is not confined within the housing. The diaphragm member——

Q. Number what?

A. 43—this housing is split, and in the split in the housing the two ends of that housing butt up and pinch this diaphragm, which is 43, colored red.

Q. Do you find in Frumveller a cup member having a peripheral portion? A. No.

Q. Do you find there a cup member having an axially inwardly offset radial flange?

A. No, and I don't find the resilient.

Q. Will you take the next patent in this book of charts, the patent to Penick, No. 1,817,095? Was that patent before the Patent Office when your patent was solicited? A. Yes.

Q. And cited as a reference? A. Yes.

Q. Do you find in there any cup member having a peripheral [235] portion and an axially inwardly offset radial flange? A. No.

Q. Now, taking the patent to Miller, No. 2,004,669, in Figure 5, do you find in that Miller patent a sealing member, a molded resilient sealing member bonded to both sides of said radial flange, substantially like the one in the Penick patent, which the file wrapper referred to in Figure 5 of Miller?

A. Similar.

Q. Do you find in Miller a cup member having a peripheral portion and an axially inwardly offset radial flange? A. No.

Q. Do you find there an oil seal of the type

(Testimony of Lloyd A. Johnson.)

adapted for insertion to seal the annular space between the shaft and a bore in the housing?

A. No.

Q. Will you turn to the next? A. Yes.

Q. That is the Heinze patent, No. 2,071,403; and another Heinze patent, No. 2,116,240. Let us deal with those together, because they are substantially the same. Do you find in this Heinze patent an axially inwardly offset radial flange? A. Yes.

Q. Is that substantially the construction of Figure 3 of the Chandler patent, No. 1,905,800?

A. Yes.

Q. Do you find in the Heinze patent, or either of the Heinze patents, the molded resilient sealing member bonded to both sides of said radial flange of said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset? A. No.

Q. Now, we turn to the Lord patent, No. 1,996,210, is that [236] for an oil seal? A. No.

Q. Is it for an air seal? A. No.

Q. What is it for?

A. It is a vibration dampener.

Q. Do you know of any oil seal manufacturer who makes them? A. No, I don't.

Q. I call your attention to the Exhibit AAE, comprised of three parts, which are said to be illustrative of the structures of the patent, and having in mind both the patent structures and those physical structures, do you find there an oil seal of the

(Testimony of Lloyd A. Johnson.)

type adapted for insertion to seal the annular space between the shaft and a bore in the housing?

A. No.

Q. Do you find there a cup member having a peripheral portion and an axially inwardly offset radial flange.

A. No.

Q. Would the device of this Lord patent function as an oil seal?

A. No.

Q. Is the device of this Lord patent any different particularly than Penick so far as showing bonding to a flange?

A. Please repeat that question.

(Question read.)

A. Yes, it is different.

Q. How?

A. Well, in the Penick patent it shows the sealing member bonded, apparently by the vulcanizing process to the part that holds it, 6. In the Lord patent the rubber member 16, in Figure 8, shows to be clamped in position.

Q. Now, will you turn to the next patent, the Anderson patent: [237] Is that substantially the same construction as the Chandler patent, No. 1,905,800?

A. Yes.

Q. Were they owned by the same company and developed by the same company? Look at the top of the patent and you can tell.

A. Yes, the same company.

Q. Will you take the next patent? In this patent to Godley, No. 1,040,308, do you find there an oil seal of the type adapted for insertion to seal

(Testimony of Lloyd A. Johnson.)

the annular space between the shaft and a bore in the housing? A. No.

Q. Do you find there a cup member having a peripheral portion and an axially inwardly offset radial flange? A. No.

Q. Do you find there a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset? A. No.

Q. Will you turn to the next patent? This patent hasn't been mentioned by the defendant. I don't know whether to take the time to describe it or not.

Mr. Haight: I am relying on all of those patents that are mentioned.

Mr. Owen: You are relying on them?

Mr. Haight: Yes, and I intend to use them in argument.

Mr. Owen: Thank you, Mr. Haight.

Q. Will you turn to this Looek patent, No. 1,740.-929.

A. The sealing member in this case is a relatively thick [238] leather washer in which on one face a groove has been turned around the center hole and a coil spring is used to contract that leather so it will seal the shaft.

Q. Do you find in that Looek structure an oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in the housing? A. No.

Q. Do you find there a cup member having a

(Testimony of Lloyd A. Johnson.)

peripheral portion and an axially inwardly offset radial flange? A. No.

Q. Do you find a molded resilient member bonded to both sides of the radial flange?

A. No.

Q. The Lee patent, No. 1,862,153, would you refer to your copy of that and explain what that is?

A. That was comprised of a pair of opposed members.

Q. What was it used for?

A. It is a pipe joint. It appears to have the functions of a gasket.

Q. Now, then, will you hold this enlargement and state whether or not you find there an oil seal of the type adapted for insertion to seal the annular space between the shaft and the bore in the housing? A. No.

Q. Do you find there a cup member having a peripheral portion and an axially inwardly offset radial flange? A. No.

Q. Do you find there a molded resilient sealing member bonded to both sides of said radial flange?

A. No.

Q. Will you turn now to the next patent? This patent is also not described by the defendant's expert. This is the [239] patent to Larsh, No. 2,000,341. What does that show, Mr. Johnson?

A. A grease seal for bearings.

Q. What kind of a seal is that called?

A. It is a seal that seals within itself, apparently.

(Testimony of Lloyd A. Johnson.)

Q. Is it a shaft seal or a face seal or what other kind of seal is it? A. It is a face seal.

Q. When you say it is a face seal, will you just enlarge on it a little?

A. I mean that in a face seal——

Q. Referring to Figure 3, the one that is colored.

A. This blue part represents the shaft?

Q. No, that represents the sealing element.

A. This blue part?

Q. Yes.

A. I would have to study this patent.

Q. Do you want to refer to your copy of it?

A. I thought it had no bearing on it. Now, what was the question?

Q. I would like you to explain how that seal operates and what type of seal it is.

A. This seal?

Q. You are referring now to Figure 8.

A. Whatever this—yes, I am referring to Figure 8. This seal has a diaphragm member within it which creates axial pressure and seals in an axial direction rather than on the shaft.

Q. In that respect it is like Frumveller, a face seal? A. In that point it is.

Q. Will you refer to Figure 3 and Figure 7, both of which have been colored on this exhibit, and explain if you find [240] there an oil seal of the type adapted for insertion to seal the annular space between the shaft and the bore in the housing?

A. No.

(Testimony of Lloyd A. Johnson.)

Q. Do you find there a cup member having a peripheral portion and an axially inwardly offset radial flange? A. Yes.

Q. In that respect is that offset radial flange substantially similar to Figure 3 of Chandler, No. 1,905,800? A. Yes.

Q. Then, do you find a molded resilient element bonded to both sides of the radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, referring to Figure 3?

A. Would you read that again?

Q. Then, do you find a molded resilient sealing member bonded to both sides of said radial flange, at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset? A. Yes.

Q. Do you find that on Figure 7?

A. Yes, on Figure 7.

Q. The patent to Oldberg, No. 2,094,160—what kind of a seal is that? A. That is a face seal.

Q. As distinguished from what?

A. As distinguished from a shaft seal. It seals on a face rather than on a shaft.

Q. And the pressure for the sealing is created how? A. Axial pressure.

Q. Created how?

A. By a spring which gives an axial force to it.

Q. Do you find there in that Oldberg structure an oil seal of the type adapted for insertion to seal

(Testimony of Lloyd A. Johnson.)

the annular space between the shaft and a bore in the housing? A. No.

Q. Do you find there a cup member?

A. No.

Q. Do you find there a peripheral portion——

A. No.

Q. ——on a cup member? A. No.

Q. Do you find there an axially inwardly offset radial flange? A. No.

Q. Is that all of the patent?

A. I think that's all.

Q. Reference has been made to the “whereby” clause in the claim in suit, and I hand you Exhibit 3 which is the electric motor with the gear reducing unit, and ask you if you will explain what that “whereby” clause means: It reads:

“Whereby said molded material is protected from wear by contact with adjacent moving parts.”

What is that describing?

A. I need that to describe it.

Q. You are referring now to Exhibit 9?

A. Yes.

Q. And Exhibit 3?

A. And Exhibit 3. The protection to the sealing member arises out of the fact that the sealing member is set in. Now, when it is applied, when the seal is applied to a shaft, or in an application of this type as in motor with a gear reduction unit, or in just a gear reduction unit, this shaft drives something, some other piece of equipment. [242]

(Testimony of Lloyd A. Johnson.)

Q. You mean the shaft coming out of the end?

A. The shaft coming out of the end of the gear reducing drives some piece of machinery. It may take the position where a gear would be attached to this shaft or a pulley and either through some means that power would be transmitted to another piece of equipment—assuming a pulley is on here, it is better engineering, and according to our patent to keep that pulley from touching the seal so that when the pulley revolves with this shaft, the sealing becomes stationary and it won't rub against the sealing member and cause injury to that sealing member. In this particular type of seal shown here——

Q. In Exhibit 3?

A. Yes, the sealing member is not exposed. It is protected by a shell that has a radial flange to it, but in this type of seal and as the one in the patent in question, without it being set inwardly, it has no protection. In other words, if this sealing member were attached to the straight portion of the case and being bonded on both sides the sealing member would stick out and therefore the adjoining parts would touch it and could injure it. Then, however, that is just one phase of the value of having this offset radial flange. There are hundreds of thousands of gear reducer units and applications of that type where it is good engineering practice to keep it from being injured.

Mr. Owen: You may cross examine. [243]

(Testimony of Lloyd A. Johnson.)

Cross-Examination

By Mr. Haight:

Q. You have just said in referring to Plaintiff's Exhibit 3 that there are hundreds of thousands of applications of that type and it is a good thing to keep the oil seal from being injured. Does any good engineer ever put an oil seal up against a moving part on a shaft? Do you know a good engineer who ever did that? A. Yes.

Q. Name him?

A. Ford Motor Company.

Q. In what?

A. The Ford automobile.

Q. Name another. A. Who did?

Q. You said hundreds of thousands. Here we have one, and I will let you off with ten.

A. I said there are hundreds of thousands of gear reducing units being built.

Q. But can you tell me any more cases where you get any function whatever of that last claim of the Johnson patent in suit. You have named one application, now, out of the hundred thousand and I will let you off if you can name ten, because I don't want to spend the time going through a hundred thousand.

A. You are speaking of applications?

Q. Yes, sir, and I am not speaking of what you say that it is a good thing to keep the oil seal away from a moving part. Every engineer knows that, don't they? A. In most cases they do.

(Testimony of Lloyd A. Johnson.)

Q. Why certainly they do. Now, go on with your one hundred thousand applications.

A. Here is one, that hundred [244] thousand.

Q. Is that one?

A. I am speaking of an application now.

Q. Does that illustrate one?

A. I say it does.

Q. Where?

A. Right at the end where the shaft comes out of the housing.

Q. What moving part is that adjacent to?

A. I don't know.

Q. Of course you don't. Why, then, do you say it is?

A. Because whatever is attached to this shaft can move.

Q. There is nothing attached, is there?

A. Not in this drawing there is not.

Q. An engineer who is not an engineer could be, or could put something up to engage it, couldn't he?

A. Yes.

Q. Would you say that any good engineer would do so? A. I said in my testimony before that, a pulley could be mounted on this shaft.

Q. Certainly you could. But out of the hundred thousand applications where you say there is an adjacent moving part to an oil seal, you have named one. Let us proceed. I will let you off with three out of one hundred thousand.

A. The pinion in the Packard automobile.

(Testimony of Lloyd A. Johnson.)

Q. The pinion in the Packard automobile?

A. Yes.

Q. What model—twenty-five years ago?

A. No, within the art we are talking about.

Q. You are staking your reputation as an engineer on that?

A. I don't have any reputation as an engineer to stake. [245]

Q. I thought not. Name the third one.

A. They are used as spacing elements.

Q. As spacing elements? A. Yes.

Q. To space what?

A. Spicer used one as a spacing element.

Q. In what? A. In a transmission.

Q. Now, let us stick to the other one phase: You say there are two applications you know of out of one hundred thousand that you said before. Can you name any more than two.

A. Aren't you taking my word one hundred thousand when I spoke of one hundred thousand gear reducers. That is what I said.

Q. One hundred thousand applications?

A. If there are one hundred thousand—

Q. So, all you meant was that there were one hundred thousand gear reducers, is that right?

A. That's right.

Q. I will let it go at that. It is agreed there are one hundred thousand gear reducers, and that is what you meant to tell the Court?

A. That is what I said to the Court.

(Testimony of Lloyd A. Johnson.)

Q. All right. You made reference to the file wrapper in your testimony this morning and I understood that you read a paragraph from page seventeen of that document, which is Defendant's Exhibit AAA. May I read the same?

"The Penick reference is of no greater value than Walker as showing that bonding is not new."

Is that what you read?

A. It sounds like it. [246]

Q. And that was your position in the patent office that bonding within the meaning you were trying to give it was not new; it was not new, was it? A. No.

Q. "As before stated, the basis on which the present case rests is believed to be one of the structure of the various parts entering into the seal."

At the time that was made, that was in this application and it is dated back to April 26, 1937. No claims were allowed in that application at that time, were there; that's right, isn't it?

A. No, that is correct.

Q. And then you made an affidavit, do you remember that, in this same document, page twenty-two and twenty-three and twenty-four, subscribed to on the 18th day of December, 1937. That is your affidavit appearing in this file wrapper, is it not?

A. It is my signature all right, but I don't know whether it is an affidavit.

(Testimony of Lloyd A. Johnson.)

Q. I understood you to say in response to counsel's question that you are familiar with the file wrapper. A. Yes, I now see it is.

Q. Yes, all right. Did you know at the time you made that affidavit the date of the drawings you produced here this morning.

A. I don't recall.

Q. I notice in the affidavit that you said, and I am now reading from page twenty-two:

“That he conceived of the idea for an Oil Seal for use [247] in sealing the space between a shaft and the hole through which it projects, consisting of a cup member having a peripheral portion for press-fit leak-tight engagement with the wall of said hole and an inwardly projecting perforated flange portion, and a sealing member composed of moldable material bonded to said flange so as to embed said perforated flange in its radial portion and having a sealing lip depending therefrom, prior to December 14, 1935.”

But you knew when you made that affidavit what the date was, did you?

A. I don't know whether I did or not.

Q. Do you know why you simply stated prior to December 14, 1935?

A. No, I don't.

Q. You know that was the date of the Gits patent, don't you?

A. I have no recollection of it.

(Testimony of Lloyd A. Johnson.)

Q. But at that time either you did or did not know the date you have given this morning, don't you?

A. I either did or I didn't.

Q. Do you remember which it was?

A. No.

Q. Can you give me any explanation now as to why you, in making an affidavit to the Patent Office, left it so vague as that, simply "prior to December 14, 1935"?

Can you give me any answer?

Mr. Owen: If your Honor please, I don't want to interrupt Mr. Haight, but Mr. Haight should know you never have to disclose [248] the real date.

Mr. Haight: That is not my practice. When the rule says to give an actual date, we give it.

Mr. Owen: I would like to see that rule.

Mr. Haight: There is not a rule, but it has to do with the credibility of the witness and also has to do with his frankness.

Q. It is also said in that affidavit, and I ask counsel to observe while I read so there will be no question about the accuracy of my reading, and I begin at the bottom of page twenty-two:

"That these sketches disclose structures illustrated in the drawings of the above-entitled application and set forth in claim eight which is as follows,"

and then claim eight is given.

You know, do you not, that you cancelled that claim, that you said was applicable to these structures? You know that, don't you?

(Testimony of Lloyd A. Johnson.)

A. I would have to have the document to look at to tell.

Q. That is correct, isn't it?

A. It probably is. Can you tell me the claim that was allowed, what number that was?

Q. That was number fifteen and that was filed after this affidavit.

A. All right, I agree with that, then.

Q. All right. So the thing that was embodied by the drawings you had then, as covered by claim eight, are those in respect [249] to which as far as claim eight is concerned, you cancelled, didn't you?

(No answer.)

Mr. Haight: How many drawings are there? I would like to know so I may examine on them, how many were offered by the witness—four or five?

Mr. Owen: Five.

Mr. Haight: Five with the sketch?

Mr. Owen: Four and the blueprint.

Mr. Haight: Will you give the witness——

Mr. Owen: Exhibit 20 was the blueprint.

Mr. Haight: Will you give the witness a copy. It would be very helpful if I could have the exhibit numbers. They are all Exhibit 23.

Mr. Owen: Except that blueprint, Mr. Haight, which is——

Mr. Haight: Yes, I will get to that one.

Q. Two of these in the exhibit to which I have just referred depict molds, do they not?

A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. Will you read the legends upon them so that we will know definitely those two I am about to eliminate?

A. "Mold" and "Top"—is that what you mean?

Q. That is what I mean.

A. "A Mold Bottom"?

Q. O.K. Now, I want you to look at the other two in that exhibit—the oil assembly and the one entitled "outer case." I notice that on these on the bottom we find the legend, EX314 and EX317. What does that mean—"experiment"?

A. Right. [250]

Q. You made a test, did you not? Was there a report made on that test? A. Yes.

Q. What became of that report?

A. It was lost.

Q. When did you last see it?

A. Years ago.

Q. Do you know who made the report?

A. Yes.

Q. Who? A. Mr. Hal Klein.

Q. Anybody else connected with it?

A. Myself.

Q. And you haven't that report? A. No.

Q. And now, do these exhibits to which I have just referred, that is, the oil seal assembly and the outer case, both in Plaintiff's Exhibit 23, represent the only sample that you made at the time that you testified about?

A. Did you ask whether they were the only samples made?

(Testimony of Lloyd A. Johnson.)

Q. Yes, do they depict the only samples you made at that time?

A. We made quite a few samples at that time.

Q. But they were all just the same as this?

A. Yes.

Q. O. K.

A. Right at that immediate time?

Q. Yes. Now, did you make only one test?

A. No.

Q. A plurality of tests? A. Yes.

Q. How many?

A. I couldn't give you the exact figure, but I can give you an approximate figure.

Q. All right. A. Ten to fifteen tests.

Q. Does that mean ten to fifteen different seals?

A. Yes.

Q. What kind of a test did you make?

A. We have what we call test units or test heads in which the seals are mounted [251] therein and tested.

Q. They weren't put in any machine?

A. That is a machine in itself.

Q. Do you know how long they were run, or any one of them? A. Yes.

Q. How long?

A. Well, I think this one seal added up to seventy-two hours, as I recall it.

Q. Have you any written record whatever of those tests?

A. No, if we had, we would have brought it in here.

(Testimony of Lloyd A. Johnson.)

Q. Now, in connection with the file wrapper and your affidavit therein, you filed a print at some time after the affidavit was made. That sketch appears in this photostatic copy on page thirty-four. Is that the same as the one entitled "outer case" shown in Plaintiff's Exhibit 23?

A. Is it the same drawing; is that the question you are asking?

Q. Yes. A. No.

Q. That is a different one, is it?

A. No, you are asking me of this photostat—

Q. Yes. A. —is the same as outer case?

Q. Yes. A. EX317?

Q. That's right. A. The answer is no.

Q. Is it the same as any other drawing you have produced here today?

A. I will have to check it.

The Court: While the witness is looking at that, we will take the afternoon recess. [252]

(Recess.)

The Court: Proceed.

Q. (By Mr. Haight): On the pending question, is the representation of the seal found in the file wrapper the same as any of those you have produced here? A. Yes.

Q. Which one? A. EX314.

Q. That is the one of the oil seal assembly?

A. Yes.

Q. Now, in testing these seals you said you had a plurality. Were they all of the same size?

(Testimony of Lloyd A. Johnson.)

A. I didn't hear the first of that.

Q. In the testing of the seals, of which you said there was a plurality, when you tested them, were they all of the same size? A. No.

Q. How many different sizes?

A. I think there were two.

Q. Were they all tested on the same machine?

A. No.

Q. Did the machines have a moving part adjacent to seals when you tested them?

A. I don't remember.

Q. Have you any records whatever in regards to tests of those seals except what you have produced here today? A. No.

Q. I call your attention to Plaintiff's Exhibit 22. Do you know when that oil seal was made?

A. It was made about—If you will let me see the other one, I think I can remember.

Q. The other one is Plaintiff's Exhibit 21.

A. Well, about the same time.

Q. Is there anything connected with these that indicates the [253] date on which they were made?

A. Well, it would have to be made before the date it was tested, which would be 9/4/35, and incidentally, I notice this seal has been tested for a month. That is more than seventy-two hours.

Q. You have been calling attention to a material that appears upon the tag attached to Plaintiff's Exhibit 21, and that is the one to which you have already called attention to, which bears, among other things, the legend, "see test report No. 109 for details."

(Testimony of Lloyd A. Johnson.)

Now, the other one also has some material upon the sample for Mr. Owen. Have you any record as to the making of those, save these tags?

A. No.

Q. In whose handwriting do we find the entries appearing on these tags?

A. Mr. Klein's, on the tags that have been on them all the time.

Q. Yes. These were made in accordance with the drawings you have produced here, were they?

A. Substantially so.

Q. Will you take this one, the one that has been marked as Plaintiff's Exhibit 22. I will give you a straight edge. Now, tell me that if after the offset—no, I read from the claim of the Johnson patent in suit,

“a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom [254] where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.”

Where is the molded material in reference to the bottom of the cup in the sample that you have in your hand?

A. Well, the inside bottom or outside bottom?

Q. The outside bottom.

A. It is right here.

Q. Put a straight edge on it. What do you say?

(Testimony of Lloyd A. Johnson.)

A. What do you want me to say?

Q. I want you to say whether the language I have read applies to the structure you hold in your hand?

A. Substantially it does.

Q. By the word "substantially" you mean that it does not, don't you? That is like things being practically the same, indicating that they are different.

A. I mean this, that in this particular sample there is some rubber protruding, maybe here.

Q. That is not like Type A here accused, is it, where we have this inset?

A. You have the inset all right.

Q. The rubber comes clear out and somewhat beyond the bottom of the cup than the one you hold in your hand?

A. Yes.

Q. So it doesn't come within the claim of the patent in suit, does it, asking you as a patent expert?

A. No.

Q. I now call your attention to the other one that you have produced, Plaintiff's Exhibit 21, and that likewise is not [255] within the claim of the patent in suit, is it?

A. Let me see—no.

Q. When you first testified, you said you first saw the device of the Victor Manufacturing Gasket Company in 1939, and then afterwards, when you come to the stand, you said you had made a mistake and said that you first saw them in 1937; that's right, isn't it?

A. No.

Q. What is right?

(Testimony of Lloyd A. Johnson.)

A. I first learned of this seal from a catalog that I obtained in 1937.

Q. I see.

A. I first saw the seal in 1939.

Q. O. K. What catalog was that in which you first saw it in 1937, the catalog of the Victor Company?

A. It has been submitted in evidence here. I don't know the number of it.

Mr. Owen: It is the one with the green cover, Mr. Haight.

Mr. Haight: Plaintiff's Exhibit 13, that's right.

The Witness: I can tell in just a second here—yes, this is it.

Q. And on its outer cover is a picture of an oil seal made by the Victor Manufacturing and Gasket Company, is there not? A. Yes.

Q. That is like Type H, is it not?

A. I can't see this far away. I can see the board, but I can't see the catalog.

Q. Oh, I see, excuse me. A. Yes.

Q. About when in 1937 did you see this catalog, Plaintiff's Exhibit 13?

A. If you will give me a catalog I will [256] tell you. I saw it just a day or two prior to December 22, 1937, when I sent it to Mr. Owen in the mail.

Q. 1937? A. Yes.

Q. And the only claim you received in the Patent Office was filed in the Patent Office on November 18, 1938, a year later; do you know whether or not you had this structure and repre-

(Testimony of Lloyd A. Johnson.)

sensation of the structure before you when the only claim in this patent suit was presented in the Patent Office?

A. Do I know whether we had this Victor seal before us?

Q. Yes, or this representation of it.

A. We had seen it, yes.

Q. And what you endeavored to do was to see if you could draw a claim that could cover it, a thing that had been on the market for a long time, isn't that true? A. No.

Q. Wasn't that your endeavor in securing the only claim you got? A. No.

Q. Wasn't that what you meant when you said in Chicago you would use it for trading purposes?

A. No.

Q. Now, as I recall, you afterwards, in the Patent Office, as appears in the file wrapper, said that the drawing you filed was typical of those: Weren't any of those different from that of the drawing you were showed, or differed from those of the drawings you have produced here today?

A. I don't get your point.

Q. Maybe I do not make myself clear. You said that the drawing [257] you filed in the Patent Office was typical of seals you have made and tested. A. Yes.

Q. Now, I want to know if in that affidavit anywhere, there was reference to the drawings you haven't produced here today?

A. Now, I am not currently familiar with that affidavit.

(Testimony of Lloyd A. Johnson.)

Q. Well, let's get it again.

A. I can't *ask* your question without knowing it.

Q. I will find it for you. It was your second affidavit, I think. I am referring to this one here, Mr. Johnson. I will read it for you:

"Lloyd A. Johnson, being duly sworn, deposes and says that he is a resident of Hillsborough, County of San Mateo, State of California; that he is the applicant in the above entitled application; that he is the Lloyd A. Johnson who filed an affidavit under Rule 75 subscribed and sworn to by him September 18, 1937; that the attached photostatic copy of a National Motor Bearing Co., Inc., blueprint is typical of the sketches referred to in the earlier affidavit as having been prepared prior to December 14, 1935."

A. Yes.

Q. What I am getting at is this: Since you said that is typical, are there any of those different from those that you here produced today that you then had, or are these the only ones? Were there any more in addition to which you have [258] produced?

A. Were there any more?

Q. Yes, were there any more?

A. Yes, there were.

Q. What has become of them?

A. I don't know.

Q. There has been another blueprint produced here that has been marked as Plaintiff's Exhibit 20. When did you first see that blueprint?

(Testimony of Lloyd A. Johnson.)

A. I can answer that in this way: I saw it at about the time it was dated. I saw the original drawing made.

Q. About when? A. May——

Q. I think that is 5/23/35.

A. That's right.

Q. And the Mr. Klein whose name appears thereon is the same Mr. Klein you have referred to heretofore, is he not? A. Yes.

Q. What has become of the original drawing?

A. I don't know; Mr. Klein prepared that original drawing as I directed him to.

Q. Did I understand you to say during your examination today that the word "bonding" was used in your plant? A. Yes.

Q. You would secure your sealing elements by clamping them, do you not? A. Yes.

Q. And is that referred in your plant also as bonding them? A. As clamping.

Q. What? A. As clamping.

Q. But the word "bonding" is never used in respect to its style? A. No, it is not.

Mr. Haight: Will somebody help me with those blue prints [259] and I will refer to the Lee patent and Lord patent, and so on, and if someone will handle those, we can get along very rapidly.

Q. Will you turn to the Lee patent. Just put it right up there so Mr. Johnson can work with it. Are you familiar with the patent of which that is a drawing? A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. In that there is bonding to both sides of the radial flange by the vulcanization process, is that true?

A. Is that what it says in the patent?

Q. I think you will so find.

A. Well, I will look at it—yes.

Q. And that is on page one, column one of the patent, where it says——

A. What line?

Q. Forty three:

“The inner member 11, including the head 10, is in spaced relation to the interior walls of the recess 5, and such space is filled with yieldable rubber 13 which is securely bonded to its contacting surfaces by vulcanization.”

That is right, isn't it? A. Yes.

Q. Will you now look at the Lord patent? I call your attention to page two of the Lord patent, column one, line fifty six:

“In all of these joints it is preferable to secure the rubber to the joint members by bonding during vulcanization [260] so that the rubber of the joint member is put under the initial tension through the shrinkage of the rubber.”

That is what it says, isn't it? A. Yes.

Q. So there is securing of the rubber by vulcanization; that is correct, isn't it?

A. Yes, in this patent.

Q. Look at the Miller patent, Figures 1, 2, and 3, page two, column one, line sixty three:

(Testimony of Lloyd A. Johnson.)

“In the construction disclosed in Figures 1, 2 and 3, the packing cup is held between the ends of the two piston plates or discs 6 and 7. According to the construction illustrated in Figure 5, a packing cup 26 is permanently molded onto the piston disc 7.”

How do you say that is fastened? Permanently molded means what to you?

A. That means that it is vulcanized on it.

Q. Now, in Penick——

A. I will agree that is molded.

Q. Now, this method of bonding by vulcanization is very old, is it? A. Yes.

Q. That was discovered by Goodyear in a Boston jail over a century ago, was it not?

A. I don't know.

Q. You don't claim you have made any invention or made any contribution to the art by using vulcanization process to attach these parts, do you?

A. No.

Q. That is old in many arts, isn't it?

A. Yes.

Q. Including the oil seal art?

A. I don't know how old [261] it is in the oil seal art.

Q. Ahead of your patent, is it?

A. I think Penick is ahead of our patent, and that is about as old as I know it.

Q. That is good enough. It is older than yours?

A. Yes, it is.

(Testimony of Lloyd A. Johnson.)

Q. Will you turn to the Frumveller patent? Here is a flange, is there not?

A. Would you turn it up the other way? That is better.

Q. Seen in this member down here in the dark cross-hatch member, and that is a flange, isn't it?

A. Is that this part you are talking about?

Q. That's right. A. Yes.

Q. That is radial, isn't it?

A. Which part of it?

Q. This part is radial.

Mr. Owen: Would you indicate by reference so the record will mean something?

Mr. Haight: All right, line forty three.

A. That is axial.

Q. That is east and west, isn't it? Is there any part of it radial?

A. Any part of that flange radial?

Q. Yes.

A. The matter between where it says "forty three" and the red color is radial.

Q. Suppose we rotated it to ninety degrees; what part is radial?

A. Well, you just reverse it. What was radial before is axial now. [262]

Q. It just depends on which way you turn it?

A. Yes.

Q. Now, how was this material, this sealing material, secured to that flange?

A. It is bonded.

Q. How?

(Testimony of Lloyd A. Johnson.)

A. It appears to be molded around that flange member.

Q. You as a man skilled in this art, if you had this before you and nothing else, would that kind of a sealing member on a sphere, do you think you would have to exercise any genius to put it on a shaft?

A. If I got the inspiration I would be lucky.

Q. And that is just the job of an ordinary mechanic with that before him, and putting it on a shaft, with that kind of a sealing member on a sphere, and putting it on a shaft with a parallel portion, or a straight section, is it not?

Mr. Owen: I object to this on the same ground Mr. Haight offered his objections.

The Court: Go ahead, I think it is proper cross-examination, even though he might be asking a question which does call for the witness' conclusion.

Mr. Haight: That is the way I have understood it for many years, your Honor.

The Court: I guess you'd better have that question read. I don't know whether the witness remembers it.

Q. (By Mr. Haight): Did you get the question? A. I am not sure of it. [263]

Q. All right, we won't pause then. Let's look at the Walker patent. Are you familiar with the Walker patent, No. 2,028,634?

A. Vaguely so.

Q. Who owns that?

(Testimony of Lloyd A. Johnson.)

A. A man by the name of Walker.

Q. Did your company ever purchase that patent?

A. I am not certain whether we bought it or took a license on it. Mr. Owen can answer that question.

Q. Isn't it true that was assigned to you March 12, 1936, and recorded March 15, 1937, and by you, I mean your company.

Mr. Owen: Mr. Haight, my recollection of that deal is we have an option to buy it. I don't think we exercised it, but we have the exclusive rights.

The Witness: I think that is it.

Mr. Haight: Well, that is as good as ownership.

Q. Are you in the fluid pump packing business—is your company? A. Fluid pump packing?

Q. Yes.

A. We make a type of seal for that, yes.

Q. In this Walker patent, the sealing element, which is, as I understand it from the patent, may be made of rubber or leather or fibrous material or the like, and is bonded to the inner surface of the threaded nut 31—are you familiar with that?

A. It has been so long, I would have to look at it.

Q. All right, we won't pause with it then.

A. There are over a thousand of these patents.

Q. You spoke—Oh, by the way, you said there were only about twenty of them in commercial use. Do you know what those twenty are?

A. I think I know most of them.

Q. Without spending much time, can you tell us?

(Testimony of Lloyd A. Johnson.)

A. I can name a few of them: The patent in suit; Chicago Rawhide has seven or eight; our company has a few; Universal Oil Seal Company has one or two; and Michigan Leather Packing Company have one or two.

Q. And so, out of a thousand patents that have gone to the Patent Office most of them have fallen by the wayside, is that right?

A. Those that are commercially successful are being used.

Q. But it is an extremely small percentage that you manufacturers consider any good; that's right, isn't it?

A. It is a small percentage that are commercially satisfactory.

Q. And the best one from the standpoint of your concern's business is the one that was discussed here the other day that you say is not covered by the patent in suit; that's right, isn't it?

A. The best patent?

Q. The one you use?

A. We use several; which one do you mean?

Q. Your commercial products.

A. Well, we are licensed under one of the Chicago Rawhide patents that more seals are made under than any other.

Q. What kind of a seal is that?

A. That is a seal in which [265] the sealing member is clamped in the case.

Q. And that is used more than any one?

(Testimony of Lloyd A. Johnson.)

A. Numerically, there are more seals made under that patent.

Q. And that is the way yours are?

A. Some of ours are.

Q. That is the way yours are fastened?

A. Some of them.

Q. Yes?

Mr. Owen: I might say for the purpose of the record that Mr. Haight was able to sustain that patent in the Seventh Circuit Court of Appeals.

Mr. Haight: I offer my apologies, your Honor.

Mr. Owen: He did a good job.

The Witness: Then, there is the Heinze patent which your company owns.

Q. (By Mr. Haight): My company?

A. Well, the Victor Manufacturing and Gasket Company; that is a dead ringer for this patent.

Q. Are there any others of these patents that are being used at all?

A. Of this type of seal a very few—about twenty of them.

Q. Of these, how many are living?

A. Quite a few—with seventeen years of life it goes back to 1929—about half of them, I guess. It is a guess, I don't know.

Q. Well, a guess is good enough on a matter of that sort. Now, in the Johnson patent itself, Figure 1, how is the sealing elements connected to the flange? A. Bonded. [266]

Q. That is, it is molded on, is that right?

A. It is molded on; bonded on.

(Testimony of Lloyd A. Johnson.)

Q. Now, in Figure 2, it is clamped, isn't it?

A. Clamped and molded—both.

Q. Yes, clamped and molded. Now, in the Johnson patent—have you the Johnson patent?

A. Yes.

Q. Will you look at page two, column one, lines thirty three to thirty six. It is describing what you are speaking of—Figure 2—at that point, isn't it?

A. Yes.

Q. Do you find this in the lines I have indicated?

A. Yes.

Q. "The composition will adhere to the side of washer 35 and also flow into holes 36 to strengthen the bond between the parts."

Isn't adherence to the side spoken of as bond in that phrase?

A. Yes.

Q. In Figure 4, I call your attention to the Johnson patent, page two, column two, lines seven and nine, and in respect to the holes 50.

A. What is that again?

Q. Lines seven to nine.

A. Column two, page two?

Q. Column two, page two, that's right.

A. All right.

Q. "A series of holes 50 are located in this wall 31 of the outer cage and aid in securing a good bond."

Isn't that right?

A. That is what it says.

Q. And in respect to Figure 5, if you will turn to the Johnson patent, page two, column two, lines twenty five to twenty nine, [267] describing that

(Testimony of Lloyd A. Johnson.)

structure, it says, beginning at line twenty three—have you it? A. Yes.

Q. “In this type the composition material will flow on both sides of radial portion 53 into holes 54. It will adhere to the sides of radial portion 53 and the composition which has flowed through holes 54 further strengthens the bond between the composition material and metal.”

You are familiar with that, aren't you?

A. I am.

Q. Isn't it true that Figure 2 has a bonding under the very use of that word that we find in the Johnson patent by the clamping, between those two flanges and that bonding is aided by the flow of material through those holes?

A. Of the washer?

Q. Of the washer, that's right, isn't it?

A. Yes.

Q. And in Figure 4, we have, as I understand, the language of the Johnson patent, a bonding of the sealing element between this flange and the cup member of this flange or washer where there is an extrusion of the sealing element itself in holes in the cup? A. Yes.

Q. It is aided in the bonding by the two flanges, that's right, isn't it? A. That's right.

Q. In one of the drawings we had this afternoon, I have forgotten which one—I will find it—this is the outer case that we have in the Plaintiff's Exhibit? A. EX317.

Q. I notice in the figure at the top that eight

(Testimony of Lloyd A. Johnson.)

holes are [268] indicated, and as I read that, there is one-sixteenth of an inch, is that right?

A. That is right.

Q. That means that there are eight holes in the entire circumference? A. Yes.

Q. And each one of them a sixteenth of an inch in diameter? A. Yes.

Mr. Haight: I think that is all, your Honor.

Redirect Examination

By Mr. Owen:

Q. Mr. Johnson, reference was made to this figure and exhibit three, and the condition under which the pulley, which would be placed on either of these shafts to make this a usefully device would butt against the oil seal that would be at either end of the housing; under what conditions does that arise?

A. Well, to put the pulley on the shaft so that when the shaft revolves, the pulley revolves with the shaft. It has to be keyed or locked in place so that it will pull the belt that is on the pulley.

Q. Under what conditions would the contact be made at the end of the oil seal?

A. In the event that the pulley becomes loose on the shaft and rubs against the oil seal. In other words, the pulley could move back and forth on the shaft, some lateral movement.

Q. Reference was made to the patent to Lee.

A. Which patent?

(Testimony of Lloyd A. Johnson.)

Q. Lee, L-e-e. A. I have it.

Q. Patent No. 1,861,153. Is the bonding there any different, [269] particularly, than it is in Penick? A. No.

Q. Is that same thing true with regard to the Lord patent, No. 1,996,210? A. No.

Q. Does Lord show a bonding like Penick?

A. Yes.

Q. In Figure 1? A. Yes.

Q. Reference was made to Figures 1, 2 and 3 of the Miller patent where the sealing flange is clamped between the two cup members; is that a clamping action somewhat like the clamping action you get in Chandler, No. 1,905,800?

A. Somewhat.

Q. Is that bonding in the Walker patent a bonding like in Penick where it is a vulcanization type of adhesion? A. Yes.

Q. Mr. Haight was just reading from the patent in suit and I would like to go one sentence from where he started in on page two, at column one, and beginning at line twenty eight:

“In Figure 2 a modified form of construction is shown in which the rubber composition material is bonded to spacing washer 35. In manufacturing this type, the spacing washer 35, which may be of metal or composition material is positioned in the mold with the composition.”

Will you explain when that operation is done? Is that before or after it is put into the outer shell 33?

A. It is done before it is put into the outer shell. It is molded to it in the molding operation.

(Testimony of Lloyd A. Johnson.)

Q. Just like it would be in Figure 1 or Figure 5?

A. Yes. [270]

Q. Is that same thing true in Figure 4, and is the sealing member bonded to the shell, and is it then that it flows through the perforations?

A. No, it is bonded to the washer.

Q. Figure 4? A. Yes.

Q. Look at the patent, please.

A. It can be done either way.

Q. How is it done in Figure 4, and what does it say? Read the patent.

A. It is bonded, according to the patent, to the outer case.

Q. Is it then that it flows into the holes?

A. Yes, it is then that it flows into these holes as it is molded, it flows into these holes.

Q. What function does that which is marked 41 on the drawings have, that is placed on the inside?

A. It has the same function as it does in the other washer in Figure 2.

Q. What is that?

A. That is, it further clamps the sealing member.

Mr. Owen: That is all.

Recross Examination

Mr. Haight: Just two questions, your Honor.

Q. In view of what you have just said I call your attention to Johnson patent, page 2, column 1 and I read, beginning at line 4:

“It is preferable to sandblast radial wall 17 of cage 8 and apply a coat of cement which will insure a good bond between the composition and the metal.”

(Testimony of Lloyd A. Johnson.)

Now, the good bond is insured by the cement, isn't it? I am going to read the next, but so far that is what it means, doesn't it?

A. It says it is preferable to do that. That is the preferred way.

Q. But the cement will insure a good bond. You are talking about the meaning of bond; that's right, isn't it? A. Yes.

Q. "Next the composition is placed in the mold and the mold closed. Under pressure the composition material will flow into openings 13 of wall 17 and tie or bond the parts together."

Bond is used there in respect to flowing in the mold, and it is also used in respect to attaching by means of cement, isn't it?

A. It is a chemical and a mechanical bond, combined.

Q. But the word "bond" is used in the Johnson patent, itself, in referring to adhering by cement, isn't that right?

A. Not entirely. It doesn't rely only on the cement. [272]

Q. That is correct, it bonds with cement and it bonds with vulcanization. You either agree with me or you don't, and I don't care. But, do you agree?

A. I agree the cement aids the bonding.

Q. And cementing is bonding under the use of the word "bond" in the Johnson patent?

A. Yes, one of the uses.

(Testimony of Lloyd A. Johnson.)

Q. Let me ask you this question: What would you say to this? Do you think this a good definition of bonding, "That to bond two articles can signify no more than to unite them firmly by any means." Is that a good definition of "bonding"?

A. I don't think it is.

Mr. Haight: In which regard the witness does not agree with the Supreme Court of the United States. That is all, your Honor.

The Court: Mr. Johnson, I want to ask you a question:

Q. I understand this patent that is referred to as a combination patent, you are not claiming in the patent that any particular material used constitutes a novelty? A. No.

Q. Your claim is that it is the particular combination of elements that constitutes this device?

A. Exactly.

Q. That makes it novel? A. Exactly.

Q. That is your point? A. Yes, sir.

Q. Are there any other companies engaged in the making, or in the manufacture of this type of seal besides the Victor Manufacturing & Gasket Company, and your company, if it is engaged in that? A. Yes, sir. [273]

Q. Are there many?

A. I can name them for you; the largest one is the Chicago Rawhide Company, Chicago and Detroit; the Michigan Leather Products Company, of Detroit; Gratton & Knight, of Worcester, Massachusetts. There is another good sized one that slips my mind now.

(Testimony of Lloyd A. Johnson.)

Q. Has your company been manufacturing oil seals for use as such in quantity? A. Yes.

Q. How long?

A. Since 1930. We have gradually increased our quantity over that period of years.

Q. In the period, say, from 1935 to 1942 or 1943, or 1944, where in that period were you extensively engaged in that business?

A. I can give you a better picture of it by saying the largest producer of oil seals is Chicago Rawhide and National Motor Bearing Company, which is my company, the second largest in the United States, which will give you some idea of the relative standing of production.

The Court: I was particularly interested in that. I think that covers what I want.

Mr. Owen: If your Honor please, with regard to one of your questions, I was not sure whether it was clear to Mr. Johnson when you said, "Are there other companies besides Victor and National Motor Bearing Company, if National Motor Bearing is making seals," whether you were referring to a shaft-type of seal to fit a bore. There may have been some ambiguity there. [274]

The Court: I am talking about the type of seal for the purpose of keeping the oil seal in place.

Are counsel ready to submit the matter on briefs, then?

Mr. Haight: Yes, your Honor.

Mr. Owen: Yes, your Honor.

The Court: All right, the matter will be submitted, 30, 30 and 30. [274-a]

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil Action No. 23697G

Suit for Infringement of
Letters Patent No. 2,146,677

NATIONAL MOTOR BEARING CO., INC., a
Corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a Corporation,

Defendant.

The Depositions of

RENI J. GITS,

FRED A. REEVES,

JAMES ZAP, and

BEATRICE M. KREJCI,

taken on behalf of Defendant, at Chicago,
Illinois, on the 4th day of October, A.D.
1945, pursuant to Notice.

RENI J. GITS

Direct Examination

By Mr. Haight:

Q. State your full name, please.

A. Reni Joseph Gits.

Q. And where do you reside?

A. 341 Scottswood Road, Riverside, Illinois.

Q. What is your occupation?

A. Manufacturer.

Q. With what concern are you connected?

A. Gits Bros. Mfg. Co.

Q. How long have you been connected with that company?

A. Since 1911. That is thirty-four years.

Q. And what is your position in that company?

A. I am President, General Manager, and I am also [7*] a designer and inventor.

Q. How long have you been such?

A. Ever since the business has been organized.

Q. And we are now taking this deposition in the plant of that company, are we not?

A. That is right.

Q. Generally, what is the business of Gits Bros. Mfg. Co.?

A. Lubricating devices known as oil cups.

Q. Any other business?

A. No, that is it, exclusively. We are making oil seals, but that doesn't amount to a great deal.

Q. When did your company first become interested in oil seals?

*Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Reni J. Gits.)

A. I would have to look that up.

Q. Approximately will do, for our purposes.

A. I think about 1924, or 1925.

Q. You need not look that up.

A. It is approximately that.

Q. I show you a patent, No. 2,052,762, issued September 1st, 1936, on an application filed December 14, 1935, entitled, "Oil Seal." It seems to be the patent of Reni J. Gits. Is that your patent, Mr. Gits?

A. That is right. That is mine. [8]

Q. Are you familiar with the structure illustrated in the drawings of that patent?

A. I am.

Mr. Haight: Mark this for identification as Defendant's Exhibit A.

(Said document was accordingly marked for identification Defendant's Exhibit A.)

Q. (By Mr. Haight): I am showing you a photostat of a drawing and some autographed material, which we are marking for identification Defendant's Exhibit B.

(The photostat of paper was accordingly marked for identification Defendant's Exhibit B.)

Mr. Haight: I will explain to counsel that this is a photostat, and we hope, when we examine Mr. Tarbox in Toledo, to produce the original, but for convenience I am using this now. We will ultimately offer the original, and will perhaps ask for leave to substitute photostats.

(Deposition of Reni J. Gits.)

Mr. Owen: That will be agreeable.

Q. (By Mr. Haight): Looking at this photostat, I will ask you if [9] you are familiar with it?

A. Yes, I am.

Q. Will you explain the structure that is represented there?

A. This is a molded part of synthetic rubber.

Q. And for what is it designed?

A. For an oil seal purpose.

Q. And what did you have to do with that?

A. I was trying to make an oil seal for Spicer.

Q. Spicer is what concern?

A. That is that Spicer Universal Joint, from Toledo.

Q. The Spicer Manufacturing Corporation of Toledo, Ohio?

A. That is right.

Q. And at the time that was made, was anybody else present?

A. Tarbox.

Q. Who is Mr. Tarbox?

A. He was the engineer for Spicer.

Q. There is another man named there. Who was he?

A. He represented Goodrich.

Q. And what is his name?

A. Haushalter.

Q. And by "Goodrich" you mean whom? [10]

A. The B. F. Goodrich Rubber Company.

Q. And what was the occasion of your being together?

A. He represented the synthetic rubber, and I represented the seal, and Tarbox was the buyer, or, in other words, the engineer, to see whether it would meet the purpose.

(Deposition of Reni J. Gits.)

Q. And what was the date of the meeting?

A. It was in 1933. It was about the middle of the year.

Q. Can you tell us accurately, by referring to the date on that photostat?

A. It has "6/30/33." I remember it was in the summer, that was the middle of the year of 1933. That I can remember. I can remember that distinctly.

Q. Do you know whose handwriting appears upon this exhibit?

A. This looks like Mr. Tarbox's.

Q. By "this" you are referring to what?

A. I am referring to the words "Tarbox, Gits & Haushalter. Prints obtained by Gits & Haushalter." This right on here.

Q. By "this" you are referring to something in writing on Defendant's Exhibit B?

A. Yes. "Drawn by Messrs. Tarbox, Gits & Haushalter [11] 6/30/33. Prints obtained by Gits & Haushalter."

Mr. Owen: Do you have a copy of that photostat, Mr. Haight?

Mr. Haight: Yes.

Q. (By Mr. Haight): I notice on this drawing certain dimensions. Those are dimensions of what?

A. Those are dimensions of the synthetic part.

Q. You say "synthetic." Synthetic what?

A. Synthetic rubber.

Q. Designed for a seal, you said a moment ago?

A. Yes.

(Deposition of Reni J. Gits.)

Q. Whose seal?

A. This is my seal, designed for the Spicer shock absorber.

Q. How does the structure of that seal compare, if it does compare, with any of the drawings shown on the Gits Patent, to which I have made reference?

A. I don't know just what you mean. The size is the same.

Q. Yes?

A. And the holding is practically the same, with an expanded ring inside, to bind it against the walls, the same as this.

Q. The same as the structure shown in your patent?

A. Yes, that is right. The only difference is that this one here was to be put into a solid shell.

Q. You say "this one here." You mean into the synthetic rubber structure?

A. That is right.

Q. Shown on this drawing, Defendant's Exhibit B. That was designed to be put in what?

A. To be put in a screw machine housing. I mean by screw machine housing a part that is made on a screw machine. I guess you know what I am talking about.

Q. Yes.

A. Whereas, this one here was designed to put in a stamping.

Q. By this last "this one here" you are referring to the structure shown in your patent?

A. Yes, when I say "stamping."

Q. Save for that, what differences if any were

(Deposition of Reni J. Gits.)

there between the structure shown in the patent and the structure for which this particular synthetic rubber member was designed?

A. The difference is, on the screw machine. The flange was on the bottom to prevent the synthetic part going through, whereas, in my screw machine part, I put the flange on top. You can follow me on that? [13]

Q. Yes.

A. I put the flange on top—I couldn't say on top, but on the top of the part that goes into the housing, where it contacts the housing. You understand that, do you?

Q. Yes, I think so. We may come back to that a little later.

When did you first conceive or think of this oil seal that is shown in your patent No. 2,052,762, the one that is before you?

A. I will tell you how this goes about. I might have made a sample of this, because I make all samples even before I make a drawing. I might have made a sample of this about three or four or five or six months before.

Q. About when did you, as you recall it?

A. The boys may be able to give you some information on that. I couldn't say.

Q. When was it in reference to the time that you had this meeting of Tarbox, Gits and Haushalter?

A. Prior to this, you mean?

Q. Yes. Was it prior?

(Deposition of Reni J. Gits.)

A. That might have been. I don't know. I want to get it right.

Q. Of course. [14]

A. At the same time, I don't want to get away off on it. This morning I thought of something which perhaps won't go on paper, or perhaps won't be made for another six, seven or eight months, maybe a year. The same thing could have happened to this. That is a hard thing to state, if that is what you are trying to get, I don't know.

Q. You said that you made your article, you made the thing before drawings were made of it?

A. That is right.

Q. Has that been your regular practice?

A. That is right.

Q. Throughout all this period that you have been operating this company? A. Yes.

Q. I think I will put it this way: Did you have the idea, did you get the conception of the structure shown in the patent that I have just referred to before the time of this meeting with Tarbox and Haushalter, which, according to Defendant's Exhibit B, was on the 30th of June, 1933?

A. What was that sales record? Wait until I get those sales records. I have to get something to enlighten me.

(A short interruption.) [15]

By the Witness:

A. (Continuing): The only thing I could say, possibly maybe two or three weeks or a month be-

(Deposition of Reni J. Gits.)

fore this date, on this 85. (Witness indicating on a card.)

Q. (By Mr. Haight): Which line are you pointing to? A. "4-12-34."

Q. About six months before that, you conceived of the particular structure shown in the drawings of the patent, is that right?

A. Yes. It was away ahead of this filing date. It was in that time there (indicating).

Q. You have just referred to a card. What is this card?

A. That is a price card, a customer's card, where we record all our orders, our quotations, and things of that kind.

Q. On that card, you referred to a particular line. Which line was that?

A. This one here (indicating).

Q. And this one here is down near the bottom of the card, and it is 4-16-34? A. Yes.

Q. That means April 16, 1934? [16]

A. That is right.

Q. Now, there are some entries there.

A. Yes. We quoted on that seal 25,000, 50,000, 75,000 and 100,000.

Q. You made those quotations on that seal. What seal do you mean?

A. That is 85, isn't it?

Q. Yes. What did the seal look like? Was that the seal of this patent?

A. Yes, that is the seal of the patent, all right. That is it.

Q. What does No. 85 seal refer to?

(Deposition of Reni J. Gits.)

A. That is this oil seal here.

Q. That is what you called that seal at that time?

A. Whether it was the one with the screw machine part or the other one, I don't know.

Q. I do not care how it is made. It is a question whether it was that seal or not.

A. Oh, yes, it was that particular oil seal. That is the one I have reference to.

Q. And that is what you called your 85?

A. That is right.

Q. I notice some other red entries in connection with that same thing. What do those mean?

A. Those are quotations. The reds are quotations, [17] and the blacks are orders.

Q. That is, on this card, when you see anything in red, as this entry is, that means you made a quotation, you offered to sell?

A. That is right.

Q. That does not mean that you got the order for it? A. That is right.

Q. The black ones mean that you got the order?

A. That is right.

Q. To the right of this 85 seal, I find some other entries. What do those mean?

A. \$78 per thousand in lots of 25,000.

Q. And lots of 50,000? A. \$77.

Q. And over here, lots of 75,000 and 100,000, \$76.25 a thousand? A. That is right.

Q. Below that I see some other entries. What do those mean?

(Deposition of Reni J. Gits.)

A. That was a felt washer that went with that. That was an additional item, it was additional to that. That is a price on the felt washer.

Q. About how long before this date do you say it was that you conceived of this structure that is [18] shown in your patent 2,052,762?

A. Which do you mean, this one structure in this steel housing, or in the screw machine housing?

Q. Let us take the screw machine housing first.

A. The screw machine housing goes away back.

Q. About how far?

A. That will go beyond April 16, 1934. That will go back at least three months, two months; because I have to make the sample, and I have to make those parts first, and then submit a price. If you will turn over this way (indicating), this is something else.

Q. Just a minute. Let me clear this up. When they are not screw machine made, how are they made?

A. They are made out of punchings.

Q. And the one illustrated in the patent is one made by punching, is that right?

A. That is right.

Q. Going back to this drawing, Defendant's Exhibit B, dated June 30, 1933, this sealing element illustrated in the drawing was designed to contact with what?

A. With the screw machine part.

Q. And the ends of this sealing element, this synthetic rubber element, what do they contact [19] with?

A. They contact the shaft.

(Deposition of Reni J. Gits.)

Q. Let us now see that other drawing, which, for identification, we will mark Defendant's Exhibit C.

(Said drawing was accordingly marked for identification Defendant's Exhibit C.)

Q. (By Mr. Haight, continuing): I show you another drawing.

A. Wait a minute. That goes back to 1933.

Q. Just a minute. What goes back to 1933?

A. That thing there. See that date on there?

Q. Yes, sure. That is what I wanted to get straightened out.

A. I am wrong. I went back to 1933 on this thing.

Q. As early as the date that appears on the drawing, Defendant's Exhibit B, June 30, 1933?

A. That is right. That is the date to go by.

Q. Now, having that straight, I am going to show you this other drawing, Defendant's Exhibit C. It has at its bottom, "Gits Bros. Mfg. Co. Chicago 7-20-33." And what are those initials down at the bottom?

A. That is Reeves. That looks like "F.A.R." That is Reeves. He will identify that.

Q. Who is Mr. Reeves? [20]

A. He is the engineer.

Q. And what was his connection, if any, with the Gits Bros. Mfg. Co. back during 1933?

A. He was here as a draftsman.

Q. Has this drawing been in your possession

(Deposition of Reni J. Gits.)

ever since? That is, in the possession of your company? A. It must have been, yes.

Q. Will you notice the structure represented upon that drawing, and, just for our convenience and understanding, I will ask you how it compares with the structure shown on the drawing Defendant's Exhibit B, that is the one of June 30, 1933.

A. It is practically the same, only they have got more detail there, $7/16$, $9/16$, $3/4$, $5/8$. It is practically the same. This is $1/8$. That is $15/1000$ wider.

Q. Without checking over all those dimensions, save for possible differences in dimensions, do they both show the same structure?

A. Yes, they do the same work.

Q. What do you call this element in black in this drawing Defendant's Exhibit C?

A. That is the synthetic part of the sealing member.

Q. And what was that designed to go into? [21]

A. Into a shock absorber.

Q. And what held the sealing member, what was that associated with, if anything?

A. That was held by a housing.

Q. Have you an example of the housing with which that was used?

A. Here is one. (Producing same). I should have another one. Do you want the other one, too?

Q. Any sample of that.

A. There is one. That is on your drawing here, that is on this.

(Deposition of Reni J. Gits.)

Mr. Owen: The witness pointed to the patent drawing.

Mr. Haight: That is right.

You have just handed me what appear to be two seals. One has been mutilated by a cut through the same. I am going to have the mutilated one marked for identification Defendant's Exhibit D.

(The seal referred to was accordingly marked for identification Defendant's Exhibit D.)

Q. (By Mr. Haight): I am going to ask you generally, as an opinion, is this structure, Defendant's Exhibit D, [22] made in accordance with the structure illustrated in your Patent 2,052,762?

A. That is right. It is identical.

Q. And will you describe that, it is mutilated, so that we can see the parts?

A. There is an expanded ring inside of the synthetic sealing member. The ring is expanded, and this is for the purpose of adhering the synthetic rubber against the walls of—what do they call that?—the outer member.

Q. That is all right.

A. The outer member.

Q. Will you look at the drawing, Fig. 1 of the Gits patent 2,052,762. I notice that in the article, Defendant's Exhibit D for identification, that is this member right here, you referred to an expanded ring. Where is that shown in Fig. 1?

A. That would be the Figure 12 here, wouldn't it, that signifies this ring?

(Deposition of Reni J. Gits.)

Q. Let me see if I get this:

“A clamping member comprising an annular ductile ring 11 is utilized to secure the packing member to the flange of the shell or housing 1.”

A. Yes. What is 12, then? [23]

Q.

“The ring 11 is formed to be received and seated in the counterbore 9 formed by offsetting the clamping portion 6 of the packing member and is provided with a centrally located annular grove 12 in its outer periphery.”

A. Oh yes, that is right.

Q. So the ring is 11? A. Yes.

Q. And where is the packing member?

A. That is the synthetic member.

Q. Illustrated in Fig. 1 of the patent drawing, isn't it? A. This member here.

Q. What do you call that member?

A. That is the sealing member. That is the synthetic part.

Q. That is the synthetic part? A. Yes.

Q. In the drawing, Fig. 1, is your clamping ring shown in its final position?

A. That is right.

Q. How is it shown over here in Fig. 5?

A. It is ready for expansion.

Q. After it is expanded, then it assumes the [24] position that you have shown in Fig. 1, is that right?

A. That is right.

Q. And this member, the synthetic member, is clamped as shown in Fig. 1, is that right?

(Deposition of Reni J. Gits.)

A. That is right.

Q. Is that true of the structure shown in Defendant's Exhibit D for identification?

A. That is right. It is identical.

Mr. Haight: Will you mark this oil seal Defendant's Exhibit E for identification?

(The oil seal referred to was marked for identification Defendant's Exhibit E.)

Q. By Mr. Haight: I show you another oil seal, marked Defendant's Exhibit E for identification. This is not mutilated. In order to save time, I am just going to ask you this leading question:

Is that the same as the one shown in Defendant's Exhibit D? A. The same thing.

Q. And illustrated in Fig. 1 of the Gits patent?

A. That is right, the same thing.

Q. Referring to these two oil seals, Defendant's Exhibits D and E for identification, where have they been?

A. You mean, where they have been?

Q. Yes. A. These particular oil seals?

Q. These particular oil seals.

A. They have been amongst my other samples.

Q. In this plant?

A. That is right. They have been in this plant, yes, sir.

Q. How long have they been here?

A. Since 1933.

Q. We referred a little while ago to a card from your order record. Where is that card?

A. Here it is. Here is No. 2.

(Deposition of Reni J. Gits.)

Mr. Haight: You referred, Mr. Gits, to a card showing orders received by this company, and quotations made, and you called attention to a particular entry that you have read into the record. We are going to leave the card here, but the reporter will mark it for identification Defendant's Exhibit F, so that later it can be looked at if we wish, and it is agreed by counsel that we may arrange to get a photostat of that, and put the photostat in evidence [26] as Defendant's Exhibit F, but this will be here to check up, if any question arises.

Is that all right with everybody?

Mr. Owen: Yes.

Q. (By Mr. Haight): These exhibits that you have shown, Defendant's Exhibits E and D for identification, have in them a synthetic rubber member, is that right? A. That is right.

Q. Did you before that time, or at any time, make that same seal, but with another member instead of the synthetic rubber? A. I did.

Q. What did you use in those?

A. Leather.

Q. And how did you conform that leather to the proper shape for those oil seals?

A. In a die, in a mould.

Q. You moulded that leather in a die?

A. Correct. You cannot mould leather, but you can form it.

Q. Yes. Now, that device was exactly the same, except that it had the leather instead of the synthetic rubber? A. That is right. [27]

(Deposition of Reni J. Gits.)

Q. Did you ever sell those?

A. The leather?

Q. Yes. A. Yes, we sold the leather.

Q. Before the time that you offered these for sale, as shown by your order record?

A. That is right.

Q. About how long before?

A. We sold them. I will have to look on here. Here we have got an order October 28, 1933, we have got an order for 74,000.

Q. And your order record shows that?

A. Yes.

Q. That was an order for how many?

A. 74,000.

Q. Was that order filled?

A. Yes, that order was filled.

Q. And to whom were those sold?

A. Spicer Manufacturing Corporation.

Q. That is the same Spicer Manufacturing Corporation that we talked about a while ago, is it?

A. That is right.

Mr. Haight: Unless you wish it, Mr. Owen, instead of putting that actual record in, I will just let it go in his statement, or we [28] will do the same as before. Would you like to have the photostat?

Mr. Owen: That is the back side of the card which has already been produced?

Mr. Haight: Yes.

Mr. Owen: Let us have it photostated.

Mr. Haight: Then may it be understood between

(Deposition of Reni J. Gits.)

counsel and the witness that we will also make a photostat of the back side, in order to show the sale to which the witness has just referred, and we will put it in evidence as Defendant's Exhibit F.

The Witness: Could you get any of this information from Spicer?

Mr. Haight: Yes, I could, but I think this will be enough.

The Witness: Because we only started keeping this record about this time, some of these orders may not be on here. If you want to get more of an accurate record of orders that we received from them, and orders we filled, I think that you ought to get it from Spicer.

Mr. Haight: I think, for our purposes, just showing one order is enough. [29]

Q. (By Mr. Haight): There were other orders of that same structure that you filled in addition to these 74,000?

A. There were other smaller orders, yes, 100, 200.

Mr. Haight: That is sufficient. Now, going back to the back side of this card, we will also photostat that, and it will be part of Exhibit F.

Will you mark this for identification Defendant's Exhibit G?

(Three members marked for identification Defendant's Exhibit G.)

Mr. Owen: Is Exhibit G the other side of the same card?

Mr. Haight: No. Both side of that card are F.

Q. (By Mr. Haight): I am now showing you

(Deposition of Reni J. Gits.)

three cup-like members, to which there is an identifying tag attached marked Defendant's Exhibit G for identification.

What are those?

A. Those are housings. These are the plain housings.

Q. Are those the same housings that we find in Defendant's Exhibits E and D?

A. Yes, the same thing.

Q. I notice, if you will call these cups, that the bottom of the cup is indented around its inner margin. Is that the way you made all those during that time? A. That is right.

Q. And that is the same construction in respect to the cup that we find in these other two Exhibits, D and E, is that right? A. That is right.

Q. And were the cups the same as those that used the leather instead of the synthetic rubber?

A. Well, they were the same shape. They were the same shape.

Mr. Haight: Will you mark this Defendant's Exhibit H for identification?

(A print of a drawing was marked for identification Defendant's Exhibit H.)

Q. (By Mr. Haight): I am showing you a print of a drawing marked for identification Defendant's Exhibit H. It bears the date 4-16-34, drawing No. G.S. 998, Gits Bros. Mfg. Co. "Proposed methods of tensioning 85 oil [31] seal."

That is the same 85 oil seal we have been talking about heretofore? A. That is right.

(Deposition of Reni J. Gits.)

Q. Do you recognize that drawing?

A. I do.

Q. What does it disclose, as you understand it?

A. It discloses an oil seal.

Q. What oil seal?

A. That oil seal that we made for Spicer.

Q. How does that structure compare with the structure shown in your Gits patent 2,052,762?

A. The only difference is it has another shell holding the spring down.

Q. Where was that drawing made?

A. At our plant here, by Mr. Reeves.

Q. Made by the same Mr. Reeves?

A. Yes.

Q. And at about the date that it bears, 4-16-34?

A. That is right.

Q. How does that compare with Fig. 6 of the Gits patent drawing?

A. It is identical to that.

Q. I show you a blue print that is also dated 4-16-34, and bears the same legends that I have [32] heretofore read, and some other autographed ones that I am coming to, and also bears some pencil marks.

Mr. Haight: I will ask that be marked Defendant's Exhibit I.

(The said blue print was accordingly marked for identification Defendant's Exhibit I.)

Q. (By Mr. Haight, continuing): Are you familiar with this blue print that we have just marked for identification Defendant's Exhibit I?

(Deposition of Reni J. Gits.)

A. Yes, because I delivered that personally to the patent attorney.

Q. And who was the patent attorney to whom you delivered it?

A. Rummler & Rummler.

Q. Which Rummler did you deliver it to?

A. Eugene Rummler.

Q. Do you know where it has been since the time you delivered it to him?

A. Oh, no doubt it has been in Rummler's file.

Q. But you recognize it as one you delivered to him? A. Sure. [33]

Q. When did you make that delivery, in respect to the time that this patent application was made that eventuated in patent 2,052,762?

A. You are asking a whole lot.

Q. Was it some time before?

A. This thing here?

Q. Yes.

A. It was right after it was made. It might have been taken a few days afterwards, or it might have been taken the same day.

Q. When this drawing shown in Defendant's Exhibit I for identification was made, did Mr. Reeves have the actual structure before him?

A. Yes.

Q. And that was in accordance with your regular practice? A. That is right.

Q. I notice upon this some pencil marks. Can you explain those?

A. When we got it to the patent attorney, it was

(Deposition of Reni J. Gits.)

necessary to make more than one drawing of this, so we split the thing up, and made two drawings of it. You have it here. That is this one here (indicating). There is one of these that holds the spring down, while the other one is held by this little [34] projection coming out.

Q. Let us get this straight. You have called attention to the fact that there are different figures in the patent drawings. We can see those. But upon this particular blue print there are pencil marks.

What change, if any, do those make in the structure shown in the drawing itself?

Let me call your attention to a particular one.

Down near the bottom of the drawing, near the center, here is a cartouche or circle drawn, calling attention to the structure within that circle.

What is represented by the pencil marks at the point to the right within the circle?

A. That is a recess there.

Q. A recess in what?

A. In the ring, in the expanded ring, in the clamping ring.

Q. That recess is shown in the drawing of the patent, is it not? A. Yes.

Q. What is the purpose of that recess?

A. For the rubber to circle around into it, so as to clinch it.

Q. A part of the rubber is to the right of the recess, is that right?

A. That is right, so it will spread over.

Q. Another part is to the left of the recess?

A. That is right.

(Deposition of Reni J. Gits.)

Q. And some of it is pushed within the recess?

A. That is right.

Q. I notice upon this same blue print, Defendant's Exhibit I for identification, the word "Witness" and under it two names.

The first one is Frank Zeman, is that right?

A. That is right.

Q. Who was Frank Zeman?

A. He was my Office Manager at that time.

Q. Is he in your company's employ now?

A. No, he is a competitor.

Q. Also the signature of M. A. Russell. Who was M. A. Russell?

A. She was an office girl.

Q. What was her first name?

A. I do not know.

Q. Is she still in your employ? A. No.

Q. I notice here the name, "R. J. Gits, Inventor." [36] Does that identify you?

A. That is right.

Q. Whose handwriting is that in?

A. That is mine.

Q. And did Frank Zeman sign his name there?

A. That is right.

Q. And did Miss Russell sign her name there?

A. That is right.

Q. I notice the jurat of a notary public over here, Beatrice M.—how do you spell that?

A. K-r-e-j-c-i.

Q. Who is she?

A. She is my private secretary.

(Deposition of Reni J. Gits.)

Q. Is she still in your employ?

A. That is right.

Q. When were those signatures placed upon that piece of paper, that blue print?

A. At the same time the notary's seal was put on.

Q. And that date is April 16, 1934, is that right?

A. That is right.

Q. Did you have any experience in trying out these synthetic rubbers in these seals? Did you try out different compositions? [37]

A. That is right.

Q. What different compositions did you try out?

A. Koroseal.

Q. And what else?

A. Duprene. And I think that there is another one.

Q. I am going to call your attention to some photostats of letters, but before doing so, what has been your custom in respect to correspondence received and copies of correspondence sent out by your company, in regard to keeping it?

A. We generally keep it for five years. Not generally, but we keep it for five years and then we destroy it.

Q. And then you destroy those things that are more than five years old, from time to time?

A. That is right.

Q. I am going to show you a series of photostats of what purport to be letters, and I, for the moment, will identify them by their dates, and sub-

(Deposition of Reni J. Gits.)

sequently we will staple them all together and give them one exhibit number.

The first one is a photostat of a letter dated July 15, 1933, addressed to your company, and [38] to your attention, R. J. Gits, and sent by The B. F. Goodrich Rubber Company. It calls attention to eight samples of Koroseal and eight samples of Duprene Compound, and it says these are being sent to you.

Were you at that time using those two different sorts of things, trying them out in these oil seals?

A. I think a little time previous to that I got the sample, and I made it myself, and it was just exactly what they liked.

Q. Even though you might have been doing it before that time, at that time you were working with those two?

A. I think I got a square piece of that stuff, I think about three inches long and about two inches wide.

Q. Yes.

A. Oh yes. Now I get it. I got that piece from Goodrich, from Haushalter there, a little piece about four inches long and two inches wide, and about half an inch thick, and from that I made my first synthetic inserts, and those were presented to Tarbox. Just when I got that, I don't know. It was all during that time. And it was O.K.'d by Tarbox, so we were to get busy, and start making the things, and I wanted a [39] slab of that rubber ready to mould, and he told me I couldn't make it, they would make it themselves. That left me out.

(Deposition of Reni J. Gits.)

I said, "All right. I will furnish the rings, you make the moulded parts and I will insert them in the steel housings."

Q. What was done after that?

A. It was a sad story as far as I am concerned. Then Chicago Rawhide butted in on us, and bought up all the synthetic rubber that Goodrich could make that year, so it left me out in the cold. I did all the experimenting, all the work, all the designing, and all the patenting.

Q. Did you try out these seals in your own plant?

A. Oh yes, they were tried out on our little testing fixture.

Q. How did they work?

A. They worked all right, only they got dry, and scored, and started to leak. They had too much spring tension on them.

Q. What did you do about it?

A. I just left it go, I didn't think very much of it, but it did the work for Tarbox, because it was a vertical slide, up and down, and it always had a [40] chance to get some lubrication, whereas, in the rotating, they were satisfied with the tension of the rubber, because they had no head of oil to hold, the oil was down to the bottom, they had a clean shaft.

Q. Does this structure of your patent, that oil seal, work either with a rotating shaft or with a reciprocating shaft?

A. Oh yes. It wouldn't make any difference.

(Deposition of Reni J. Gits.)

Q. I am going to show you another letter, dated August 11, 1933, addressed to Mr. R. J. Gits, Gits Brothers Manufacturing Company, sent by The B. F. Goodrich Rubber Company, the first paragraph of which states, in part:

“In the attached mailing bag we are forwarding to you a quantity of oil seal rings made in accordance with Figure 2 on your sketch dated 7-20-33.”

A. That was our sketch.

Q. I find that Defendant's Exhibit C is dated 7-20-33. Is that the sketch?

A. That is the sketch.

Q. Then he says something about NRA, and so on, that is of no importance here.

The next letter is dated August 24, 1933, [41] addressed to you, and your company, by The B. F. Goodrich Rubber Company, with copy, apparently to Mr. Tarbox. This also has something to do with those rings. I won't stop to go into it at all.

A. Yes. That is those expanding rings we are talking about.

Q. The expanding rings used in your oil seal?

A. Yes. They had some trouble. We had to trim them.

Q. The next letter is dated August 30, 1933, addressed to R. J. Gits, President, Gits Bros. Mfg. Co., from The B. F. Goodrich Rubber Company, by J. E. Thomas, with copy to Mr. G. L. Tarbox—Spicer Mfg. Co. They refer there to making an equal number of Duprene and Koroseal oil seals.

(Deposition of Reni J. Gits.)

They also say that they regret that they had approximately 43 Duprene seals ready for shipment, and then there is some discussion about the trimming of them.

To my mind, the point about this is this mention as of that time of the Duprene and Koroseal oil seals.

The next one is dated August 31, 1933, a letter to you as President of your Company, also from The B. F. Goodrich Rubber Company, with copy to [42] Mr. Tarbox, in which they refer to forwarding to you Koroseal oil seals, and seven samples of Duprene seals.

Do you remember receiving seals from them at that time? A. That is right.

Q. And you used them here?

A. That is right.

Q. The next one is dated September 1, 1933, addressed as the previous one, and signed as before, with copy to Mr. Tarbox.

They speak here of forwarding thirty-nine Duprene oil seals and six Koroseal oil seals.

Do you remember receiving those about that time? A. Yes.

Q. And the next one is copy of a letter of September 5, 1933, addressed as before, signed as before, copy as before, and again refers to the sending of Koroseal oil seals "for which we have metal rings."

Were those transactions going on during that period? A. That is right.

(Deposition of Reni J. Gits.)

Q. And the next one is September 25, 1933, [43] addressed and signed as before, this one apparently sent by Mr. Haushalter, with copy to Mr. Tarbox.

It speaks of some tests, and speaks again of the Koroseal and Duprene seals, then something about trimming them.

The next one is dated September 25, 1933, from Goodrich to Tarbox, and it says that he has written to you as per copy attached, and the one I have just referred to of September 25, 1933, is apparently the copy attached, and the one I am now referring to of the same date, attention to Mr. G. L. Tarbox, refers to the letter written to Mr. Gits requesting 100 more of the brass insert rings for the seals for the hydraulic shock absorbers, and speaks of their going ahead with 50 each of the seals of Koroseal and Duprene, as soon as the rings are received.

The next one is a copy of a letter dated March 27, 1934, to Gits Bros. Mfg. Co., from Spicer Manufacturing Corporation, by Mr. Tarbox.

It says:

“We have given your Number 85 Seals, both hardnesses, thoro tests, and find the harder material works OK.”

Did you at that time have some harder and some softer [44] material? A. That is right.

Q. Can you give us briefly what the differences were between them?

A. The harder material held the shaft a little more firm.

Q. It refers to the Number 85 Seals. Those

(Deposition of Reni J. Gits.)

were the ones that you said before you made in accordance with your patent? A. Yes.

Q. The next letter we have is from Gits Bros. Mfg. Co., signed by R. J. Gits, to the Spicer Manufacturing Corp., saying that the Number 85 seals are working out satisfactorily.

(Reading):

“Mr. Zeman, who called on you yesterday at Toledo, advises that you wish these seals redesigned and made according to our OS-438, except 5/16” wide.”

What does that refer to?

A. What date is that?

Q. March 29, 1934.

A. It is another job, I think. No, it refers to 85. Our OS-438, that is our standard oil seal.

Q. Yes. [45]

A. And they wanted them the same width, because they used our standard oil seal first in the housing.

Q. What was the standard oil seal?

A. The standard oil seal was that 438, that was the width. That was the standard oil seal. Now, the standard oil seal is the same, except it is 5/16” wide. The standard oil seal must have been a little wider.

Q. That refers to dimensions, then?

A. That refers to dimensions.

Q. The next one is one of July 19, 1935, to

(Deposition of Reni J. Gits.)

Tarbox from Gits Bros. Mfg. Co., by R. J. Gits, which says:

“—we are enclosing two samples in the attached mailing bag, the seal material made from Koro-seal.

“We are getting samples of Thiokol from the Manhattan Rubber Company and as soon as they are received we will forward additional seals made from this material.”

Do you remember using Thiokol?

A. Yes, it wasn't any good.

Q. And the ones that worked were the other two? A. Yes. [46]

Q. The next one is a copy of a letter to Gits Bros. Mfg. Co., dated July 22, 1935, from Spicer Manufacturing Corporation, G. L. Tarbox, saying that they had received the seals mentioned in your letter of July 19, and put two of them on test.

(Reading):

“These are showing up very nicely. Can we obtain twelve of these so that we can put some of them on road test immediately?”

The next one is dated July 25, 1935, to Spicer Manufacturing Corp., from Gits Bros. Mfg. Co., saying:

“As requested in your letter of July 22nd, we are sending you under separate cover twelve oil seals made from Koroseal.

“The Thiokol seals are going forward to you in the next ten days.”

(Deposition of Reni J. Gits.)

The next one is dated August 23, 1935, from Gits Bros. Mfg. Co. to Tarbox, referring to Thiokol seals.

The next one is dated September 5, 1935, to Gits Bros. Mfg. Co., from Spicer Mfg. Corp., by G. L. Tarbox, saying:

“We have tested the latest seals you sent to us. [47]

We found the ones made with Koroseal to be pretty good. The Thiokol seals did not work.”

I think you will recall that, from something you said a little while ago. A. Yes.

Q. The next one is dated September 20, 1935, to Spicer Manufacturing Corp., from Gits Bros. Mfg. Co., saying:

“—the last sample seals made with Koroseal are working out satisfactorily.”

I have here a drawing with entries on it that supposedly are made by Mr. Tarbox. We will get to that tomorrow. “Put 4 on test 7/29/35,” signed, “G. L. Tarbox.” At the top of that is a drawing, and one of the members is referred to as “Koroseal,” with a lead line.

Are you familiar with that? Do you know whose drawing that is?

Mr. Owen: Have you ever seen it before, Mr. Gits?

A. (By the Witness): I don't remember. A thing like that I wouldn't remember.

Mr. Owen: Shall we mark that for identification? [48]

(Deposition of Reni J. Gits.)

Mr. Haight: Yes. It refers to these letters.

Mr. Geppert: "J" will be the letters.

Mr. Haight: This group of letters I have referred to, and will prove up further later, is stapled together, and we will mark it for identification Defendant's Exhibit J.

(The photostats referred to were stapled together and accordingly marked for identification Defendant's Exhibit J.)

Mr. Haight: Will the reporter now mark the drawing referred to, that has not yet been identified by the witness, but for future purposes, as Defendant's Exhibit K for identification.

(The photostat referred to was accordingly marked for identification Defendant's Exhibit K.)

Mr. Haight: You may cross-examine, Mr. Owen.

Cross-Examination

By Mr. Owen:

Q. Referring to your patent 2,052,762, which is Defendant's Exhibit A for identification, the sealing member shown there, and identified by the numeral 5, is not bonded on that sealing flange 5, is it? A. No.

Q. It is made separately and then put in later?

A. That is right.

Q. And it is put in by expanding the ductile ring 11 outwardly, and that deforms the clamp portion of the sealing flange 5, is that correct?

(Deposition of Reni J. Gits.)

A. That is right.

Q. You said that you made that same seal, and sold some, with a leather sealing flange in place of that synthetic?

A. That is right.

Q. And the date of that sale, was it October or September, 1933, an order for 74,000? Would you check your record? A. 9-28-33.

Q. That would be September 28, 1933, wouldn't it? A. Yes. [50]

Q. That was an order for 74,000? A. Yes.

Q. Do you have a blue print or anything showing that seal?

A. We gave you all the blue prints we had here.

Q. You mean, you gave them to counsel for the other side?

A. You see, we just started to make blue prints at that time. Prior to that, we made samples. You could get that better from Reeves. I don't remember that stuff. Do you remember Reeves telling us about that stuff?

Mr. Haight: Yes. We will get that when Mr. Reeves comes on the stand.

A. (By the Witness, continuing): I couldn't enlighten you on that. You would have to ask Reeves.

Q. (By Mr. Owen): What was the number under which that seal was sold?

A. I think it was 85.

Q. The same as this?

A. I read it from here. That's all I can say.

(Deposition of Reni J. Gits.)

Q. Do you have any samples of that seal among these samples that you have produced? [51]

A. I don't know.

Q. Do you want to look here?

The Witness Did we have some of those?

Mr. Owen: You are addressing Mr. Haight now?

Mr. Haight: I have not seen them.

The Witness: When you fellows left here, I have so much to do, that thing went out of my mind like that.

Mr. Geppert: We took nothing along with us.

The Witness: No, I don't think you did. I will have him bring up the samples.

(A short interruption.)

A. (By the Witness): Here is one. I think I ought to clean it a little more so you can see it better.

Q. (By Mr. Owen): This sample you have produced is not a complete sample, is it?

A. Well, there is your expanding ring. The superintendent will look a little further. I would like to get a complete one. He is looking for another one.

Q. You mean one out of those 74,000 that you made in 1933?

A. That is right.

Q. How soon were those shipped after that order was obtained?

A. That followed pretty quick. It was two or three thousand a day. We had to go very fast.

Q. How soon after the order, would you judge?

(Deposition of Reni J. Gits.)

A. I think about three months, that order was completed in about three months.

Q. When did you start shipping?

A. That I couldn't tell exactly. Maybe a couple of weeks, I should judge, because the experimental work and the tuning up was done while in process. I think in about a couple of weeks after the order was received.

Q. A couple of weeks after 9-28-33, you began to ship? A. Yes, that is right.

Q. When you put a leather sealing flange in place of the synthetic, and when the ductile ring 11 is expanded out to clamp the leather ring in the case, you get a deforming of the clamped portion of the leather member, do you not?

A. Not to affect the sealing member, because it is away down at the other end of the sealing [53] member.

Q. You are referring to the sealing lip?

A. Yes.

Q. I am not referring to that. I am referring to the clamp end of the seal, which is the end clamp in the case.

A. To start with, the leather fits here (indicating).

Q. You mean, it fits the inside bore of the shell?

A. That is right.

Q. Now, when the ductile ring 11 is expanded outwardly to clamp the leather member in the shell, the recess 12 would cause a deforming, or change the shape of that clamped portion of the leather member, wouldn't it?

(Deposition of Reni J. Gits.)

A. Very little. It would have to change it somewhat in order to fit. If it didn't change it, it wouldn't mean anything, it could be left the way it is. That is why we had that clamping there.

Q. To make it change its shape, and clamp tightly there, isn't that correct?

A. Yes. You see, I can hold much more with a knife edge than I can with something $1/8$ thick, with less pressure. [54]

Q. So that when this ductile ring was expanded out against the leather sealing member, it caused the deformation of the leather sealing member between those two metal parts?

A. Just as you see in there.

Q. Just as you see in the patent drawing?

A. Yes.

Q. So that the deformation is similar, whether it is a leather sealing member or a synthetic sealing member, so far as the clamping action is concerned?

A. Yes, but very little. We had to expand about $1/10,000$ ths.

Q. Wasn't the synthetic sealing member a tight fit when you put it in there? A. Yes.

Q. So that the deformation was substantially the same? A. Very, very little.

Q. You mean in leather, as well as in synthetic?

A. I think it was a little more in synthetic than it was in the other, because the rubber was much more uniform.

(Deposition of Reni J. Gits.)

Q. Are you familiar with what is known as cold flow in this matter of synthetic sealing members?

A. Well, that would be a cold flow. [55]

Q. No. I mean in this sense, Mr. Gits, that a synthetic member which has been moulded will begin to lose its resiliency, and will flow into a new shape, and will lose tightness. Are you familiar with that in this sealing business, with synthetics?

A. The only effect it had when it was heated up, if I got nothing above 180, I didn't get any flow.

Q. But it was when it got hotter?

A. When it got hotter, I would get flow.

Q. It would flow, and it would expand? That is correct?

A. Yes—it wouldn't necessarily expand. It would flow. It would flow where the pressure is. Wherever the pressure was, the rubber would flow.

Q. Then when it cooled down again, it would loosen up, wouldn't it?

A. It would practically stay in the position that that particular member that put the pressure on it put it. In other words, it moulded it again.

Q. Then, as it got hotter again, and got cold, and hot and cold, it would begin to loosen up, wouldn't it?

A. I don't know. I think you get less pressure on it. The first time it was heated, you had more pressure, it leaked further, it expanded more, it leaked more, that is, the rubber.

(Deposition of Reni J. Gits.)

Then the next time it didn't have quite that much, because the pressure was already released. That is the experience I had in synthetic rubber. It didn't necessarily leak because it flowed the first time.

Q. But as it repeated itself, got hot, and cold, then it would, in time, begin to leak there?

A. That is possible, that is possible. Maybe the first time it only got 180, and the second time 170.

Here is this box now. You can all have one.

Q. Looking again at your patent drawing 2,052,762, there are no holes in that radial flange 2 of the case, are there, into which the synthetic rubber is anchored, and that opening in the case, which is the numeral 3, in Fig. 3, is just a plain cylindrical hole, isn't it? A. That is right.

Q. Then if that sealing member, that synthetic sealing member loosens up in there for any reason, there is nothing to hold it against spinning in that cylindrical bore 3, is there?

Do you want the question read? [57]

A. No, I understand what you mean. No, there is not. There is nothing except the expansion of the ring.

Q. And if it loosens up, there is nothing to hold it, anchor it from rotation? A. No.

Q. Then as the ductile ring 11 in your seal is expanded out to fasten the sealing member in place, whether it is rubber or whether it is leather, it is simply compression fitting, compressing that sealing member in there? That is all that holds it, isn't it?

A. Yes, that is right.

(Deposition of Reni J. Gits.)

Q. That sealing flange is at room temperature, isn't it, when it is assembled in the case and the ring expanded? A. Yes.

Q. And that sealing flange, with its little flange 8, is not described in this patent as bonded to the radial flange of the case 2, is it?

Mr. Haight: The patent shows that. I do not think it uses the word "bonded."

A. (By the Witness): Of course, if you can go by the drawing, this thing is away on the outside here, you see. [58]

Mr. Owen: The witness is pointing now to the ductile ring.

Let me reframe my question.

The Witness: I know what you are talking about. When this thing comes over, that pulls that against it (indicating).

Q. (By Mr. Owen): Just a compression fit?

A. That is right, a compression fit.

Q. There is no bonding?

A. When this thing comes out this way, naturally it will pull down here.

Q. It is just a compression tightness?

A. Yes.

Q. There is no bonding?

Mr. Haight: You do not want this witness to give you a definition of "bonding," do you?

Q. (By Mr. Owen): There is nothing there but a compression fit of the sealing member against that radial flange, is that right?

(Deposition of Reni J. Gits.)

A. It is just like nailing a board to the wall.

Q. They are just pressing against each other?

A. Yes. [59]

Q. You have never made, then, and sold any devices like your patent 2,052,762 with a synthetic sealing member in them except for those experimental samples you furnished to Spicer?

A. No, we didn't.

Q. You have made and sold a large number of other types of oil seals, haven't you? A. Yes.

Q. Do you know how many million since 1935?

A. Oh, I don't know. It doesn't run into millions. I paid such a high royalty for those, that is how I worked on this, and that is how I got around that.

Q. Have you made a million oil seals?

A. I think so. I think, since then, we might have made a million oil seals; about two or three hundred thousand a year.

Q. Have you a file with your other patents in it, the other patents you have taken out, besides the one, 2,052,762?

A. What do you want it on? Oil seals?

Q. Yes, just the oil seal.

A. I will get them.

(A short interruption. Witness produces papers.) [60]

Mr. Owen: I am interested in copies of your issued patents. Thank you, very much.

(Deposition of Reni J. Gits.)

Q. (By Mr. Owen): You have produced here a sample of a seal having a leather sealing flange. Is that leather flange held in by an expanded ductile ring? A. Yes.

Q. Like your patent in suit, 2,052,762?

A. That is right.

Mr. Owen: I offer in evidence, as Plaintiff's Exhibit 1, sample of an oil seal produced by the witness.

(The sample of an oil seal so offered in evidence was accordingly marked Plaintiff's Exhibit 1.)

Q. (By Mr. Owen): That seal is like those 74,000 that you made and sold in September of 1933? A. That is right.

Q. The original tag which was on the oil seals marked Defendant's Exhibits D and E for identification, do you have that there? A. Yes.

Q. What does it say on that original tag? [61]

A. "Gits Synthetic Seal"—no. "Gits"—"Hydraulic Seals," is it?

Q. "Gits Hydraulic Seals?"

A. It looks that way. I don't know.

Q. Is that your writing? A. No.

Q. Is there any date on that tag? A. No.

Mr. Haight: Just to explain that, somebody in my office put that on.

Mr. Geppert: That is the reason I took it off.

Q. (By Mr. Owen): Then were there any tags on the seals Defendant's Exhibits D and E when you first located them for counsel for defendant?

(Deposition of Reni J. Gits.)

A. No, they were just in my regular safe, where I keep all my samples, and I put my reference labels on them.

Q. You have no date, or tags, or anything, on them, to indicate when they were made?

A. No. All I go by is the samples that I give the boys to take.

Q. Is it your usual practice to put date tags on samples when you make them? [62]

A. No, not as a rule, I don't.

Q. I call your attention to Defendant's Exhibit I for identification, and in particular to the ductile expanding ring, and, as shown originally in that tracing, in this blue print made from the original tracing, wherever the original tracing is, it shows no recess there to correspond with the recess 12 in the ring 11 of Fig. 4, does it?

A. Yes, it shows it there. It is pencil marked.

Q. But the original tracing and the blue print do not show it? It was put in afterwards, in a pencil change? A. Yes.

Q. Isn't that correct?

A. That is correct.

Q. The same thing is true of Exhibit H?

A. Yes, I think that was a copy from that, wasn't it? No, there seems to be something wrong somewhere. Is that a copy from there, or what?

Q. You mean, is H a copy from I?

A. Yes.

Mr. Geppert: It was a copy that you furnished us.

(Deposition of Reni J. Gits.)

A. (By the Witness, Continuing): That is from the original blue [63] print, then.

Q. (By Mr. Owen): Do you have the original tracing here? A. I think we have.

Q. Will you find it?

A. I will see if we have got it.

(Short interruption.)

Mr. Owen: We will go on while we are waiting for that to come up.

Q. (By Mr. Owen): Is Frank Zeman located here in Chicago?

A. Yes. You have his address, haven't you?

Q. Is M. A. Russell located here in Chicago?

A. Yes.

Q. The oil seal that you have referred to as Number 85, and which you said you had tested in your fixture, was never given a field test out in the field, was it? A. Oh, sure.

Q. By yourself?

A. By Tarbox, by the Spicer Corporation.

Q. You were not present when it was tested?

A. No. I delivered the samples, and I suppose the next day they put them in the shock absorbers.

Q. But you were not present, you do not know [64] that of your own knowledge?

A. No. According to the correspondence, they did.

Q. But that is just hearsay.

Do you have any drawings which would show the screw machine casing in which the sealing element of Defendant's Exhibit B was housed?

(Deposition of Reni J. Gits.)

A. You mean, if I have that screw machine part where this is inserted?

Q. Yes, or do you have any drawing showing it?

A. I don't think so, with me. I don't know.

Q. Could you sketch on a piece of paper what it was like, if you remember?

A. Yes, I have one here for you. I don't have two. I can give you one. There you are. Here is your ring. Here is your cup.

Q. Those are the parts of the seal which has been offered in evidence as Plaintiff's Exhibit 1, is that correct?

A. Do you see these grooves I have in here, to hold that leather in place?

Q. Yes. In other words, they are like screw threads.

A. It has got the same thing on the ring. [65]

Q. You have produced a seal like Plaintiff's Exhibit 1, taken apart. That is correct, isn't it?

A. That is right.

Q. And in those parts where you clamp the leather sealing member, on its outer periphery you have threads?

A. Or grooves, you could call them.

Q. Or grooves. And on the little ring that holds it in place, inside, you also have grooves?

A. Grooves.

Q. Are those rings on the little inside clamping ring, those grooves, are they threads, or are they just parallel grooves around?

A. Parallel grooves.

(Deposition of Reni J. Gits.)

Q. And those hold the leather?

A. Those hold the leather.

Q. And that is what you call that screw machine type of casing in your earlier testimony?

A. That is right.

Mr. Owen: I offer as Plaintiff's Exhibit 1-A the seal like Exhibit 1, which the witness has disassembled.

The Witness: This is another one of my inventions (indicating). From that we make our prints.

(The article, so offered in evidence, was accordingly marked Plaintiff's Exhibit 1-A.)

Q. (By Mr. Owen): You have produced the original tracing from which the print Defendant's Exhibit H for identification was made, and do you know when this original tracing was changed, and the indentation on the expanding ductile clamping ring was put in there?

A. That must have been about in——

Q. I mean, do you know actually when it was done. I don't want you to guess. Do you know? If you don't know, say so.

A. I don't know exactly when it was done.

Q. You do not know by whom?

A. It might have been done by Reeves up here, the draftsman. It was not done by Tarbox, because this was kept in our possession.

Q. But you do not know when it was done in your own plant?

A. No. It seems to me this thing was printed from that.

(Deposition of Reni J. Gits.)

Q. You are now examining Exhibit I?

A. No doubt this was done when this was presented to Rummler & Rummler, because this was always in [67] Rummler & Rummler's possession.

Q. But if you will look at Defendant's Exhibit I for identification, the blue print, those lines corresponding to the pencil changes on the original tracing are not on that blue print, made in the blue printing process, are they?

A. No, that was not done at the same time, but this was done, "Omit in main," this was done when it was presented to the patent attorney.

Q. By you? A. By me.

Q. Are you familiar with the Johnson patent 2,146,677 that is owned by the National Motor Bearing Company, and is in suit in this case?

A. I have a copy of it.

Q. Your company was never charged with infringement of that patent, was it? A. No.

Mr. Owen: That is all.

Redirect Examination

By Mr. Haight:

Q. On this question of the loosening of the rubber member, in the tests that you made, did that loosen? [68] A. No.

May I correct one thing?

If that gets hot enough to change its form, the seal is a flop.

Mr. Owen: Did it get that hot in any of your tests?

(Deposition of Reni J. Gits.)

The Witness: I had no trouble with that at all.

Mr. Owen: You never ran them at high temperature?

The Witness: Well, no, I don't think so. The only trouble we had was the rubber adhering to the shaft.

Mr. Owen: But you never tried what we call a temperature test on this particular seal?

The Witness: No, I don't think so.

Q. (By Mr. Haight): Something was said about leaking, when you were talking about the flow of the rubber.

Did the seals themselves, in their operation on the shaft, leak?

A. No, because you have that report from Tarbox that they are O.K.

Q. Something was said about the effect upon the rubber of expanding this expansible ring. In patent [69] 2,052,762 I notice on column 1, page 2, the following:

“Thus, when the clamping ring is expanded to secure the packing member to the shell flange, the clamping portion 5 of the packing member is forced into the groove 12 and at the same time that portion of the packing member that extends beyond or outside of the shell flange is extruded over the edge thereof so as to overlap its margin as at 13 in Fig. 1.”

A. That is right.

Q. Is that the way you made them?

(Deposition of Reni J. Gits.)

A. That is right. You look at it with this magnifying glass, and you see that exactly.

Q. There has been presented to you an oil seal that you produced with its leather member, such as was used to fill one of the orders that you referred to? A. Yes.

Q. I have not seen this opened up. It has an expanding ring, within it, does it? A. Yes.

Mr. Owen: Exhibit 1-A is the opened up one.

Q. (By Mr. Haight): In respect to that and the casing, it is the same construction as the one in which you used the resilient rubber?

A. That is right. It has got an expanding ring, and still has today.

Mr. Owen: How did you expand that ring, Mr. Gits, in Exhibit 1?

The Witness: I think it was done with a tool, with six or eight parts, that open up like this, something on that order (indicating). There are many ways of doing that.

Mr. Owen: I want to know how you actually did it.

The Witness: Yes. With fingers that open up (indicating).

Q. (By Mr. Haight): The expanding ring you are now talking about is the one that is shown in Plaintiff's Exhibit 1-A? A. That is right.

Q. You have produced the original tracing here of drawing G.S. 998, which we offered on the record as Defendant's Exhibit H for identification.

I notice in this original drawing a little business

(Deposition of Reni J. Gits.)

down here near the bottom at the center, at the edge of the expanding ring. What is that? [71]

A. That is the recess in the ring.

Q. And that is like the recess in the ring shown in Plaintiff's Exhibit 1-A?

A. No. These are grooves all around. You have three grooves here, where you have only one there, a wider one. I don't know whether that makes any difference or not.

Q. No, we just want the structure. That recess is also shown, is it not, in Defendant's Exhibit H, at the same point? Look at it.

A. Yes, that is shown there.

(Following the taking of the depositions of Fred A. Reeves, James Zap and Beatrice M. Krejci, the witness Reni J. Gits was recalled as follows:)

Mr. Haight: I would like to recall Mr. Gits for just a couple of questions.

Redirect Examination

(Continued)

By Mr. Haight:

Q. Mr. Gits, you have just appeared, bringing some samples. I hand you one, and ask you what it is.

A. That is a Duprene seal, sealing member.

Q. And there is a tag upon it. What appears [72] upon the tag?

A. Figures.

Q. Do you know who placed those there? Do you recognize that handwriting?

(Deposition of Reni J. Gits.)

A. I think that is Reeves'.

Q. Is Mr. Reeves still here? I would like to ask him.

A. It is only parts. I don't know what it means.

Mr. Haight: I wonder if we can ask Mr. Reeves, if he can identify that handwriting.

I am going to have the back of this tag marked Defendant's Exhibit L, and the back of this one marked Defendant's Exhibit M, for identification.

(The tags referred to were accordingly marked Defendant's Exhibit L and Defendant's Exhibit M, respectively, for identification.)

Q. (By Mr. Haight): I am showing you this little member, with tag attached, that has been marked Defendant's Exhibit L. There are two dates upon it, 7-20-33, and 9-27-33.

What is that?

Mr. Owen: Sketches.

Q. (By Mr. Haight, Continuing): You brought this into the room. [73] Where did you get it?

A. I got it where I got all the other parts.

Q. The collection of things?

A. The collection of things.

Q. What does that represent?

A. That represents a sample of the sealing member.

Q. How does that compare, if you can compare it, with the sealing member shown on the sketch, Defendant's Exhibit C?

A. Well, that is identically what it is.

(Deposition of Reni J. Gits.)

Q. I show you an exhibit for identification, Defendant's Exhibit M. It has three members attached to it. A. That is the same thing.

Q. You just came in here with that. Where did you get it?

A. I got that from my box of parts, of experiments.

Q. What are those things?

A. That is the sealing member of the seal.

Q. What are they made of?

A. Some are Koroseal, and the other is Duprene.

Q. One of them is black in color, and two of them are brown. Can you identify what they are made of? [74]

A. Yes. This is the Koroseal.

Q. The two brown ones are Koroseal?

A. That is right. This may be Duprene—yes, this is Duprene.

Q. That is the black one? A. Yes.

Q. On this last assemblage of three, marked Defendant's Exhibit M, I notice upon the tag, "G. S. 1016," and then a date. What does that first symbol mean? A. "G. S."

Q. Do you know? A. No, I don't.

Mr. Haight: That is all.

Mr. Owen: Nothing further.

(Deposition closed.)

FRED A. REEVES

Direct Examination

By Mr. Haight:

Q. Will you state your full name?

A. Fred Alan Reeves.

Q. Where do you reside?

A. I live at 59th and Hathaway avenue, on Rural Route 2, in Downers Grove. That is my address. I live out of the incorporated limits of any town.

Q. What is your occupation?

A. I am Chief Engineer here.

Q. For Gits Bros. Mfg. Co.?

A. That is right, sir.

Q. How long have you been employed by that company?

A. I don't know the exact date. I can give you the year and the month. It was May, 1932. [76]

Q. When you first came here, what work did you do?

A. I was employed here as a draftsman.

Q. At that time, were there any other draftsmen here? A. No, I was the only one.

Q. Did you have any record of drawings at that time, when you arrived here?

A. When I came here, there were very few records of any kind, of any of the products. Any we have now have been made since.

Q. And how long did you continue as a draftsman?

(Deposition of Fred A. Reeves.)

A. More or less, I still am. How do you want that answered?

Q. That is a perfectly good answer. But when did you first get your position as engineer?

A. Well, I will tell you. Being the only engineer here in that work, I would say that, officially, I would be considered Chief Engineer from 1939, but my duties are the same and were the same ever since I have been here, up to the first of this year, probably.

Q. I show you a drawing that has been marked here for identification as Defendant's Exhibit C. Are you familiar with that drawing? [77]

A. I recall making it. That is my handwriting, or printing, I should say. These are my initials, just as I still make them today. The figures are all in my writing. Yes, I made that.

Q. "Gits Bros. Mfg. Co. Chicago 7/20/33 F.A.R."?

A. That is the initials, showing I drew it.

Q. You placed all of those upon this sheet, did you?

A. That is right. All of those pencil markings are mine.

Q. And you made the drawing that appears about the center of that sheet, did you?

A. Yes, sir, that is correct.

Q. From what, if anything, did you make that drawing?

A. I made that from a sample piece, having a shape that was cut in two, to make that section

(Deposition of Fred A. Reeves.)

view of it—that represents a section—to better illustrate all the dimensions of the part.

Q. And it was a piece of what. What was the material?

A. I believe it was Koroseal, either Koroseal or Duprene compound. It was a composition material. I would not recall at this date exactly which one it was. We had some of both. [78]

Q. Has the drawing been here in the possession of your company ever since?

A. I have had that in my engineering data file, because it has no drawing number assigned to it. We did not have a drawing system at the time those were made up, a registered number system.

Q. Did you ever see the device that is in the drawing put into an oil seal?

A. Yes, sir, certainly.

Q. Where?

A. Right here in the plant.

Q. What did those oil seals look like?

A. May I use one of these for illustration?

Q. Yes, you may.

A. It was a seal something on the type of this one, this one, or this one (indicating).

Mr. Owen: The witness is referring to Plaintiff's Exhibits 1 and 1-A.

Mr. Haight: I will get to that.

Q. (By Mr. Haight): Any others?

A. This one here, too, except there were some variations conducted at the time in the form. This one has a little different form in the back, but the material, in general form, is the same. [79]

(Deposition of Fred A. Reeves.)

Q. You have referred to what we have called here Plaintiff's Exhibit 1, and Plaintiff's Exhibit 1-A, and Defendant's Exhibit D.

A. That is right.

Q. When you speak about the form, what do you mean, in respect to this Defendant's Exhibit D?

A. This illustration, at the time that it was made, was made from a piece that has the back end of this in this arrangement, as one of the methods used for holding it, it is shaped slightly different from the other ones. This one had a ring in it, as this one had.

Q. All the time, you have been talking about the one on the drawing? A. Yes.

Q. You have just referred to this one here, which is Defendant's Exhibit D?

A. Yes. All right. Defendant's Exhibit D has the same method of holding it in here, that is, the expansion ring. That is the part that was on the drawing. Of course, the ring is not shown on the drawing, it is strictly the moulded part, the composition.

The only other difference is in the slight flange that comes up here to keep this one going, [80] because this one had the flange on the metal part.

Q. What flange are you referring to, in Defendant's Exhibit D?

A. I am referring to this stop flange here.

Q. That is in this cut portion, in this section?

A. That is right, in this section view, the composition is formed into a flange immediately in

(Deposition of Fred A. Reeves.)

front of the metal portion, to act as a stop in indexing the part into the metal piece.

Q. When you look at the bottom of the cup, as I recall it, in Defendant's Exhibit D——

A. It looks identical to the one on the drawing.

Q. (Continuing): ——how does that compare with respect to its surface with Plaintiff's Exhibit 1?

A. Wait a minute. I wish to ask for clarification of what you want to know.

Q. All right.

A. This seal is without the additional felt retainer in the back of it. The leather or composition that was used in some of them, from where it is fastened in the metal behind that felt, would look exactly as this does, at the back.

Q. That is, like Defendant's Exhibit D does at the back?

A. That is right. There is only the addition [81] of the felt.

Q. Let us talk about Defendant's Exhibit D. You called attention to the cross-section, where it had been cut.

A. That is right, the form of the metal.

Q. That does not go on the same plane all the way. Can you see that on the back or bottom of the cup? A. Yes, you can.

Q. That is, that is not all in the same plane?

A. No, that is right. There are two different planes.

(Deposition of Fred A. Reeves.)

Q. What I was talking about was in this Defendant's Exhibit D, what you call the flange is inwardly offset at that point?

A. That is correct.

Q. I show you another drawing, or a print, dated 4/16/1934, which we are calling here Defendant's Exhibit H for identification.

Are you familiar with that?

A. Yes. I made that drawing.

Q. And you also have before you here, have you not, the original tracing?

A. That is correct.

Q. When did you make that, Mr. Reeves? [82]

A. I made that. The date upon the drawing is the date the drawing was completed. The actual drawing of that was started a day or two before, because it has been a policy of mine here, in making those things, that it served both as a layout and as an assembly drawing, therefore, great care was taken in making the drawing so that the relationship of a dimension to the picture is actually to scale, as far as it is practical to make it.

Q. What is anything did you have before you when you made this drawing, Defendant's Exhibit H?

A. That was made from a sample seal of that construction. In other words, I had the article, whether I had just one sample, or more. It has been customary, when I have made anything like that, to have several samples, and I would either myself, or they were furnished to me, cut cuts so as to see the section view.

(Deposition of Fred A. Reeves.)

Then I had one of the individual parts, of which I could take the micrometer measurements, and reassemble it, and then check it, and reassemble it.

Q. Did you actually test any of these yourself, Mr. Reeves?

A. Operating tests, you mean?

Q. Yes.

A. I had an interest in it. Some of it, not [83] altogether. That is, not that I completely tested them, but in association with others in the concern.

Q. What kind of tests did you have to do with?

A. They were operated on shafts here, with test fixtures that we had, that consisted of a revolving shaft, in which seals were placed and tested as a unit, and they were run at various speeds, up to somewhat beyond the average motor speed, which is 1800 r.p.m., and tests for durability, and leaks, and wear, and those tests would take as much as a week, before any of them were completed, or records made of any kind.

Q. How did they work?

A. The seals worked satisfactorily. The one right there worked very satisfactorily.

Q. I have called your attention to one of these samples, Defendant's Exhibit E. Are you familiar with that?

A. Both Defendant's Exhibit E and Defendant's Exhibit D are identical, except that one shows a section view, a piece has been cut out to show a section view, and the other one is the whole part, a portion of a completed seal.

(Deposition of Fred A. Reeves.)

Q. In making some of these tests here in the plant, such as you did make here, when were those made in [84] reference to the time you made this drawing?

A. Those were made before the drawings. The reason for that was that Mr. Gits made these samples, as far as assembling it, and he made some of the parts himself, and of course, other employes in the plant, where machine workers were involved. For example, the shells, where the outside case was made in the punch press department, and during that time, after those were assembled, the various models were tested, of which this Exhibit H is one, they were tested after they were assembled, before drawings were made of them.

Q. Your attention has been called to Plaintiff's Exhibit 1. A. Yes.

Q. What is the sealing member in that, of what material, if you know?

A. This is leather material.

Q. Did you have anything to do with the manufacture of any of those, or like those?

A. Yes. I made drawings of dies for forming leathers, and drawings or sketches of some sort of this metal, brass housing, which this is formed into. And the method of holding this seal, the sealing member, is done in the same manner that was used on the [85] parts shown on Defendant's Exhibit C, and there was also used the same form of holding it as shown on Defendant's Exhibit D and Defendant's Exhibit E.

(Deposition of Fred A. Reeves.)

Q. Is there any custom obtaining in this plant in regard to your correspondence, that is, letters that the company receives, and copies of letters it sends, as to the keeping of them? Do you have any custom?

A. You mean, keeping the records?

Q. The keeping of your letters, the correspondence?

A. How do you mean that? Like how long we keep them?

Q. Yes, how long do you keep them?

A. The policy here is that after the fifth or sixth year—I should say after the fourth or fifth year, the entire correspondence files for that oldest year are destroyed, they burn them up.

The reason for that is, we have no facilities here to keep any files of that kind. It has been our policy to do that for a great number of years, as long as I have been with the concern.

Q. Notwithstanding that, have you made any search to see if there is any older correspondence, going back to these years 1932, '33, '35, in there?

A. In relation to this subject? [86]

Q. Yes.

A. With relation to this seal part, I did, but I could find no record whatever of any kind, as far as correspondence or purchases of material for that, because those are also destroyed, on the same basis.

Mr. Haight: You may cross-examine.

(Deposition of Fred A. Reeves.)

Cross-Examination

By Mr. Owen:

Q. Looking at Plaintiff's Exhibit 1, how was that clamping ring tightened in there, or was it tightened in any way?

A. Yes, it was done with an expanding tool, a tool that makes it expand.

Q. I believe your testimony is that the manner of holding the sealing member in Exhibit 1, as well as in Exhibit D and Exhibit E, and in the devices shown in the patent 2,052,762, was substantially the same?

A. That is right, yes, sir.

Q. In these tests that you say were run, did any of those seals score the shaft?

A. I do not recall of any instances where it happened. If they had, there would have been something [87] made to correct the situation in the seal. I do not recall of anything of that sort.

Q. The flange which you have referred to, which is No. 8 in the patent drawings of 2,052,762——

A. That is correct.

Q. (Continuing): ——you said that was for indexing it in the outer case, in other words, positioning it.

A. That is right, positioning it.

Q. That was not bonded or cemented to the inner shell?

A. No, it was not bonded or cemented to the inner shell.

(Deposition of Fred A. Reeves.)

Q. You relied solely on the expansion of this ductile ring 11 to clamp the sealing member in the outer shell? A. That is correct.

Q. And there were no holes or any means of interlocking the sealing member to the outer shell flange? A. No, there were not.

Mr. Haight: When you say "holes," you are referring only to the holes, where it says, "Other means of interlocking"?

Mr. Owen: Yes. Yes, holes or other means through the radial flange of the outer shell. [88]

Q. (By Mr. Owen): You understood that?

A. Yes, sir, I understood that. The expanding ring held the part in, nothing else, no cement used.

Q. There was no interlocking?

A. No additional holding of any kind.

Mr. Owen: That is all.

(Following the depositions of James Zap, Beatrice M. Krejci, and the recalling of Reni J. Gits, the witness Fred A. Reeves was recalled, as follows:)

Redirect Examination

By Mr. Haight:

Q. I show you, Mr. Reeves, Exhibit L. Are you familiar with that? A. Yes, sir.

Q. What is it?

A. That is an actual part of what is sketched on the two sketches, the original sketches. That is one of them.

(Deposition of Fred A. Reeves.)

Q. You say that is one of them. You are identifying Defendant's Exhibit C?

A. Defendant's Exhibit C.

Q. Any other sketch? [89]

A. I haven't seen the other one, it has not been presented to me, to my knowledge. There is another one, yes. The other date signifies the other sketch on which this part is.

Q. I notice at the top of this card the following: 7/20/33. Do you know who placed that there?

A. I did.

Q. Do you know when you placed it there?

A. You mean the date I placed it on there?

Q. Yes. It bears this date.

A. It bears this date, yes. I placed this on here recently, when I took these parts that go with that drawing so as to identify the part, the sketch referred to on the back.

Q. What is the other entry upon it, 9/27/33?

A. That is the date of another sketch, showing also this part.

Q. Let me see if I can sum this up. This Exhibit L is an actual member that is shown in two sketches.

A. That is right.

Q. But those entries you made fairly recently?

A. That is correct.

Q. Just to identify them?

A. That is right. [90]

Q. On Defendant's Exhibit M, we have three members. Do you recognize those?

A. That is correct. The first one, G. S. 1016, is

(Deposition of Fred A. Reeves.)

our Drawing number, and the other line is 12/14/33, that is the date upon that drawing.

Q. When did you make the entries upon that card, on the back?

A. At the same time they were made on the other ones.

Q. That is, fairly recently? A. Yes, sir.

Q. I notice on this exhibit, two numbers that are brown, and one is black. Do you know what they are, respectively?

A. Yes. These light colored brown ones, as you call them, are Koroseal compounds, and the dark one, that is Duprene, what was known as Duprene at the time. You can tell by the smell.

Mr. Haight: You may examine.

Recross-Examination

By Mr. Owen:

Q. Where is that sketch of 9/27/33? Do you have it? A. No. [91]

Q. Is it just a duplicate of the other, of 7/20/33?

A. You had some drawings here, which you took those out of, you had the original. The drawing is on an old style form. There is no drawing number on it.

Mr. Owen: Also see if you can find that G. S. 1016.

Mr. Haight: Off the record.

(Discussion off the record.)

(Deposition of Fred A. Reeves.)

Redirect Examination

By Mr. Haight:

Q. Mr. Reeves, you have produced here another drawing. What is this, an original?

A. It was an original sketch. At the time it was made, we had no drawing system here, and it was just drawn on the paper.

Q. I notice it is dated 9/27/33, and down at the bottom it has "Sketch of Koroseal or Duprene Seal for Spicer Manufacturing Corporation."

A. That is correct.

Q. The structure shown seems to me to be a drawing, but a reverse of Defendant's Exhibit C, the drawing of 7/20/33, isn't it?

A. Yes. The sectional area is identical to [92] Defendant's Exhibit C.

Mr. Haight: In view of that, I see no necessity for placing it on the record.

The Witness: These are fractional figures. These are decimally given, even to the tolerance of the specific part. They are identical otherwise.

Mr. Haight: In view of the fact that it is identical with Defendant's Exhibit C, I see no necessity of placing it on the record.

Mr. Owen: That is agreeable.

Recross-Examination

By Mr. Owen:

Q. Can you find that drawing, G. S. 1016, that was referred to a minute ago here?

(Deposition of Fred A. Reeves.)

A. Here it is. That is the same thing. That is a ring. It has circular grooves.

Mr. Owen: Inasmuch as there is nothing in the record to show the details of this Plaintiff's Exhibit 1 and Plaintiff's Exhibit 1-A, I suggest that the print, G. S. 1016, be introduced.

Mr. Haight: All right.

Mr. Owen: That is what it relates to. [93]

The Witness: Yes. It relates to those things.

Q. (By Mr. Owen): You mean, Exhibit 1?

A. That is right, Plaintiff's Exhibit 1.

Mr. Haight: I will offer it in evidence, then, as Defendant's Exhibit N.

(The document referred to, so offered in evidence, was accordingly marked Defendant's Exhibit N.)

(Deposition closed.) [94]

JAMES ZAP

Direct Examination

By Mr. Haight:

Q. Will you state your full name?

A. I go here under the name of James Zap, but my name is Zapivovarsky.

Q. What is your first name? A. James.

(Deposition of James Zap.)

Q. But you are commonly called James Zap?

A. That is right.

Q. What is your address?

A. 6225 Pershing Road.

Q. In Chicago?

A. That is Berwyn, Illinois.

Q. What is your occupation?

A. Shop Superintendent.

Q. For what company? [95]

A. Gits Brothers.

Q. Gits Bros. Mfg. Co.?

A. That is right.

Q. We are in their plant here today, are we not?
A. Sure.

Q. How long have you been connected with that company?

A. I am sure it is twenty-seven years this spring past. It will be twenty-eight this coming May.

Q. Have you been Shop Superintendent from the beginning?

A. No, sir. I have been Shop Superintendent for ten years.

Q. Before that, what were you?

A. I was set-up man, and foreman in the press department.

Q. What were you along during the years 1932, '33, '34, along in there?

A. That is what I was, set-up man, superintendent.

Q. I show you a drawing that we are calling here Defendant's Exhibit C. Are you familiar with that drawing?
A. Yes.

(Deposition of James Zap.)

Q. Did you have anything to do with it?

A. Well, yes. I helped produce the dies on [96] that. I also moulded the leather parts that were on here.

Q. Did you put out any product, any oil seals that had a leather sealing member?

A. That is right, for Spicer.

Q. Then did you later make some with rubber composition material?

A. Whether we produced that or not, I wouldn't be too sure. I fooled with it, I used some tools to fasten them, and I think we made samples.

Q. I show you another drawing, a photostat, which we are calling here Defendant's Exhibit H, dated 4/16/34.

Are you familiar with that?

A. Oh, yes. I made the shells for that, the outer shells for that, the metal part.

Q. How are they made?

A. The metal part?

Q. Yes. A. Off of stamping.

Q. Do you see anything before you on the desk here that illustrates the structure of that drawing?

A. Here, these shells here.

Q. You have picked up a shell that has been marked Defendant's Exhibit E for identification, and another one that has a section cut out, that is marked Defendant's Exhibit D.

A. That is right.

Q. You were familiar with those back during that time? A. That is right.

(Deposition of James Zap.)

Q. I now show you another set of exhibits, three of them, all marked Defendant's Exhibit G.

Are you familiar with those?

A. That is right. That is the same thing right there. That is before that piece had been modeled.

Q. When you say, "That is the same thing right there" you are referring to Defendant's Exhibit E?

A. That is right.

Q. You had to do with the making of those, did you? A. That is right.

Q. Back during what time?

A. That is in about 1933, sometime the later part of 1933.

Q. Do you know of any custom here in regard to the making of drawings? Do you make your drawings first, and make your article afterwards, or do you make the article first, and make the drawing afterwards? [98]

A. That is what we used to do here before, we would work on the samples, and then later on make the drawings, after we had something worked out.

Q. I notice these offsets in Defendant's Exhibit G, also in Defendant's Exhibit D and E. I do not see any on the back of Plaintiff's Exhibit 1.

A. This is from a bar. It would not be necessary on this.

Q. How were those made?

A. Those were made on a screw machine.

Q. And these others, Defendant's Exhibits G, D and E, they were made on what kind of a machine?

(Deposition of James Zap.)

A. That is on a punch press, that is the little stamping, but the part that really goes in there was also made on the screw machine.

Mr. Haight: That is all.

Cross-Examination

By Mr. Owen:

Q. You mean the expanding ring was also made on the screw machine? A. Yes.

Q. Have you any record of the dies from which you made the parts like Exhibit G? [99]

A. I am afraid not. That is all hand made, and as we go along, we make parts, and so forth, for that.

Q. The sealing member shown here in Exhibit C for identification was leather?

A. Yes. We have two dies for that.

Q. For forming the leather?

A. That is right.

Mr. Owen: That is all.

(Deposition closed.) [100]

BEATRICE M. KREJCI

Direct Examination

By Mr. Haight:

Q. Will you state your full name?

A. Beatrice M. Krejci.

Q. And where do you live?

(Deposition of Beatrice M. Krejci.)

A. 2614 South Homan, Chicago.

Q. What is your occupation?

A. I am bookkeeper, and Mr. Gits' personal secretary.

Q. Employed by Gits Bros. Mfg. Co.?

A. By Gits Bros. Mfg. Co., correct.

Q. How long have you been connected with that company? A. Nineteen years.

Q. Are you also a notary public?

A. Yes, I am. [101]

Q. I am showing you a document, that we are calling here Defendant's Exhibit I for identification. Do you find anything in your handwriting thereon?

A. Yes, my notary affidavit.

Q. That is, these words, "Subscribed to before me this 16th day of April, 1934. Beatrice M. Krejci, Notary Public?" A. That is right.

Q. And you wrote that at what time?

A. At what time?

Q. Yes, what date?

A. Well, the date that was on that.

Q. And affixed your notarial seal at that time?

A. That is correct.

Q. At the time you placed that on there, were these other signatures upon this document?

A. Yes, they were.

Q. Of Mr. Gits, Mr. Zeman and Miss Russell?

A. That is correct.

Mr. Haight: That is all.

(Deposition of Beatrice M. Krejci.)

Cross-Examination

By Mr. Owen:

Q. Do you keep any record of the things that you notarize? [102] A. No, I don't.

Q. Does the law require that notaries keep a record, or a book?

A. I don't think so. Most of the things I am required to notarize are Canadian affidavits. I do not keep a record.

Mr. Owen: That is all.

(Deposition closed.) [103]

Mr. Haight: I would like to offer at this time all the exhibits produced on behalf of the defendant except that group of letters, Defendant's Exhibit J, and the drawing, Defendant's Exhibit K.

(The said documents, so offered in evidence, being Defendant's Exhibits A, B, C, D, E, F, G, H, I, L, M and N.)

Mr. Haight: May we waive the signatures on these depositions, and if any corrections are to be made when Mr. Owen sees them, we can very easily handle that.

Mr. Owen: That is agreeable, and if there is any question between us as to corrections, we can put it up to the witnesses, and find out what it is.

Mr. Haight: That is entirely satisfactory.

It is also stipulated in regard to exhibits offered by the respective parties, that they may be retained by counsel, subject to production on notice, and so forth.

Mr. Owen: That as soon as the depositions are completed, they will be filed, along with the original transcript. [104]

Mr. Haight: It is so agreed.

(Which were all the proceedings had upon the taking of depositions herein at the time and place aforesaid.)

[Seal] EARL W. RADFORD,
Notary Public, DuPage
County, Illinois.

My Commission expires September 8, 1949.

[Endorsed]: Filed U.S.D.C. Oct. 10, 1945.

[Endorsed]: Filed U.S.C.C.A. May 21, 1947.

In the United States District Court for the Northern
District of California, Southern Division

Civil Action No. 23697G

Suit for Infringement of
Letters Patent No. 2,146,677

NATIONAL MOTOR BEARING CO., a Corpo-
ration,

Plaintiff,

vs.

CHANSLOR & LYON CO., a Corporation,
Defendant.

Depositions of

FRED L. HAUSHALTER and
G. L. TARBOX,

taken at Toledo, Ohio, October 5th, 1945.

Present:

On behalf of Plaintiff: A. Donham Owen, Esq.,
2110 Mills Tower, San Francisco 4, California.

On behalf of Defendant: George J. Haight, Esq.,
Chicago, Illinois; Carl F. Geppert, Esq., Chicago,
Illinois.

STIPULATION

It is hereby stipulated by and between counsel
for the parties hereto that the deposition of Fred
L. Haushalter may be taken at the Spicer Manufac-
turing Company, Toledo, Ohio, on the 5th day of
October, 1945, instead of the time and place men-
tioned in the notice hereto attached.

FRED L. HAUSHALTER

of lawful age, being by me first duly cautioned and sworn as hereinafter certified, deposes and says as follows:

Direct Examination

By Mr. Haight:

Q. Mr. Haushalter, will you state your name?

A. Fred Lee Haushalter.

Q. Where do you reside? A. Akron, Ohio.

Q. What is your business or profession?

A. I am a Development Engineer of rubber products.

Q. What connection have you at the present time?

A. I am connected with Baldwin Rubber Company at the present time, of Pontiac, Michigan.

Q. Were you ever employed by the B. F. Goodrich Rubber [2*] Company, of Akron, Ohio?

A. Yes, sir. I was with Goodrich twenty-five years.

Q. What years were you in their employ?

A. 1919 to 1944.

Q. During the years 1933, '34 and '35, what was your position with that company?

A. I was a Development Engineer in the New Products Department.

Q. Who was the head of that department?

A. J. D. Beebe.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Fred L. Haushalter.)

Q. Were you at that time acquainted with the Spicer Manufacturing Company?

A. Yes, sir. I was well acquainted with Mr. Tarbox, with whom I worked on rubber parts for Universal Joints in particular.

Q. When did you first start to work on rubber parts in connection with Mr. Tarbox; about what time?

A. You mean for other parts than seals?

Q. No, just for seals.

A. Just particularly for seals?

Q. Yes.

A. Well, it was about the middle of 1933.

Q. I show you a letter which is marked for identification as Defendant's Exhibit O. I said a letter, —it is a copy of a letter and it will later appear, I think, that this came from the regular files of the Spicer Manufacturing Company in charge of Mr. Tarbox. Are you familiar with that instrument?

A. Yes. I recognize that because previous to this I had given Mr. Tarbox slab of our Koroseal which is a new synthetic that Dr. Seman of Goodrich developed.

Q. Do you know the purpose for which it was to be used?

A. Well, Tarbox told me he was having trouble with the seal on this direct action shock absorber on which they got into production and then had to recall from production because of the fact the seal was leaking on this small shaft. Of course the com-

(Deposition of Fred L. Haushalter.)

pany was bringing pressure to bear on them to lick this seal problem and he was given the job of getting a satisfactory seal and particularly of material that would be an improvement on leather which seemed to leak, particularly on this small shaft.

Q. Did you see the device to which this was to be applied? A. The shock absorber?

Q. Yes.

A. Oh yes, I took the whole thing apart. We looked over the whole assembly.

Q. I show you another letter which for identification has been marked Defendant's Exhibit P, dated May 20th, 1933, apparently on the letterhead of the B. F. Goodrich Rubber Company, signed by that company. Whose signature is that, if you know? A. That is my signature.

Q. I note that that letter said, "I was glad to know [4] that you think our synthetic rubber has a possibility of success as a seal on your new type of shock absorber." Did you at that time do anything further with respect to furnishing such material?

A. This letter apparently was in reply to that previous exhibit. We gave him, then, further slabs of material from which Tarbox machined the first samples that were tried in his shock absorber. We proposed to build them single cavity mold material. He did not want to wait, so he took the slabs and machined them out on the lathe before molded samples were produced.

(Deposition of Fred L. Haushalter.)

Q. I show you a copy of a letter from the same source heretofore stated which has been marked by the reporter for identification as Defendant's Exhibit Q. Can you identify that as having been received from Mr. Tarbox?

A. Yes. I recognize that. He gave us an order then, to cover the material.

Q. What was that material?

A. We gave him about three types of synthetic rubber. Just which one we are giving him here—we had the Koroseal; then we had Duprene which was later changed to Neoprene with Duprene synthetic, and then we also gave him natural rubber.

Q. I show you another letter dated June 26th, 1933, on the letterhead of the B. F. Goodrich Rubber Company, which the reporter has marked Defendant's Exhibit R. Do you recognize the signature at the bottom of that letter?

A. Yes. That is my signature. [5]

Q. Does that refresh your recollection on looking at it as to anything that you did at that time?

A. Well, we made a single cavity mold and molded this material, samples of this oil resisting stock in the black Dupreme from a single cavity mold, and was shipping it to him for a trial in his shock absorber. This material here, 3RT-14 is Koroseal.

Q. I have in mind, Mr. Haushalter, the original of the drawings that were identified on the record as Defendant's Exhibit B, and with your permission—I am not going to mark the original—but will

(Deposition of Fred L. Haushalter.)

leave the witness and Mr. Tarbox identify the original.

Mr. Owen: That is all right.

Q. I show you a drawing of which Defendant's Exhibit B is allegedly a copy or photostat. In looking at the original, do you recognize that?

A. Yes, I recognize that sketch. It is really a drawing.

Q. Do you know who made that drawing?

A. I made the actual drawing. Those are my figures and my lettering.

Q. Do you recognize the handwriting appearing upon the paper below the drawing itself?

A. Well, I could not swear to the handwriting as to whose that is.

Q. I notice that it says drawn by Mr. Tarbox, Gits and Haushalter, June 30th, 1933. Prints obtained by Gits and Haushalter." [6]

A. That is not my handwriting.

Q. Do you remember when that sketch was made?

A. After making the samples that Tarbox referred to in these previous exhibits, Tarbox is merely trying to make a seal out of different materials and they did not make out, so he was contacting various people who might know something about seals. I imagine he contacted about a half dozen companies.

Mr. Owen: I object to anything that you do not know of your own knowledge.

(Deposition of Fred L. Haushalter.)

A. Well, I merely knew that from the fact he called me into the picture with Mr. Gits on this occasion. In other words, I was called over here one day with Mr. Tarbox. It apparently was June 30th, 1933.

Q. Who did you meet? A. Mr. Gits.

Q. Did you ever meet Mr. Gits before that time?

A. No. I never met Mr. Gits before.

Q. Did you and Tarbox and Gits have a discussion on that day?

A. Yes. The three of us got around Tarbox's desk. It was in the old building. This is the new building, here. It was the same type of laboratory, and we discussed the quality. Tarbox had the samples that I had previously sent him in the first two previous exhibits. Without analyzing the troubles he had with this in his tests and the leakage he had, we sat down and tried to design a seal that would overcome those difficulties, and this sketch is a result of that conference. I made a drawing after we agreed on the [7] tolerances on these features. For instance this .409, .412, a tolerance on that which had to fit the small shaft.

Q. Can you tell us the dimensions of the shaft; that is, its diameter?

A. The shaft is a half-inch rod.

Q. You identified Mr. Beebe as manager of the New Products Department, the chemical division of the B. F. Goodrich Rubber Company. I show you a letter which the reporter has marked for iden-

(Deposition of Fred L. Haushalter.)

tification Defendant's Exhibit S. Do you know the signature on that letter?

A. That is Beebe's signature, and he was my boss.

Q. I now show you a letter which came from the files of the Spicer Manufacturing Company, I think it will be shown, and a copy of it already appears in Defendant's Exhibit J on this record, but I will show you a copy that I think we will show came from the Spicer Company files. Are you familiar with that letter addressed to Gits Brothers Manufacturing Company?

A. Yes. In other words, after we designed this seal, we apparently had to mold it in a mold and a single cavity mold was then made to produce seals to that sketch.

Mr. Owen: You mean sealing member when you say seal?

A. Yes, sealing material or sealing member.

Q. You are referring to the sketch of June 30th, 1933? A. That is right.

Q. Which is on the record as Defendant's Exhibit B. Calling your attention to this letter of July 15th, 1933, do [8] you know anything about the samples therein referred to?

A. Well, these eight samples here is the Koro-seal Compound which is the same material as the slab we previously sent him, 3RT-14.

Q. What can you tell us of the eight samples of Dupreme Compound?

(Deposition of Fred L. Haushalter.)

A. This is the same as the Dupreme slab we sent him previously.

Q. Were those samples sent?

A. Yes. Those samples were sent. Gits received this material and assembled that resisting material into a seal.

Mr. Owen: We object because you don't know whether he assembled them or not because you were not there.

A. But I have seen them after they assembled them.

Q. I show you a letter which for identification has been marked Defendant's Exhibit T on the letterhead of the B. F. Goodrich Rubber Company dated July 19th, 1933, addressed to Mr. Tarbox. Do you recognize the signature at the bottom of that letter? A. That is my signature.

Q. That refers to the sending of certain samples therein described. Do you recall whether or not those were sent?

A. Yes. Those samples were sent and we cut the mold to overcome some of the difficulty that appeared on the first samples that we tested. I had frequent contacts with [9] Gits myself. He stopped at Akron three or four times to go over this after we made samples and we had sent the stuff to him.

Q. I show you another letter which I understand came from the files of the Spicer Manufacturing Company. A copy of it has already been identified in the record as part of Defendant's Exhibit J. This

(Deposition of Fred L. Haushalter.)

is a letter of August 11th, 1933, from the Goodrich Rubber Company to the Gits Brothers Manufacturing Company. Do you recall anything about the forwarding of oil seal rings made in accordance with the sketch dated 7-20-33?

Mr. Owen: I object to this witness testifying to this letter because he did not write the letter and there is nothing on it to indicate he has any knowledge of it.

Q. I am asking the witness, do you recall anything about this transaction?

A. Mr. J. E. Thomas was the correspondent in our department. We only had a very small department. There was only about four of us in it. At times, when I was away, Thomas would forward samples that were made upon my order, and these were some of them because these rings that were used in sealing material to extend it into the housing, we molded some of our sealing material with those rings right in the mold.

Q. Where was that done?

A. That was done at Akron.

Q. Did you have anything to do with the actual manufacturing of these synthetic rubber molds with the ring imbedded? [10]

A. It is on my order that these were molded because I had the mold changed to incorporate the brass ring in the mold.

Q. I am placing this next one out of Mr. Tarbox's file, out of order, but I am not going to in-

(Deposition of Fred L. Haushalter.)

terrogate this witness about it. It already appears in Defendant's Exhibit J. That is the letter of August 24th, 1933, to Gits Manufacturing Company from the B. F. Goodrich Company, J. E. Thomas, copy to Tarbox. The next letter is one of August 30th, 1933, to Gits Brothers Manufacturing Company from the Goodrich Rubber Company, J. E. Thomas, with copy to Tarbox, which is also in Defendant's Exhibit J. Also, I am placing in its regular place the August 31st letter, 1933, to Gits Brothers from Goodrich, copy to Tarbox.

Mr. Owen: Just so the record is clear for what is being done, we are preparing for the convenience of a subsequent examination of another witness. Mr. Haight is arranging them in order.

Mr. Haight: That is correct. I am doing the same with the next two letters, September 1st, 1933, Goodrich to Gits, and one of September 5th, 1933, Goodrich to Gits.

Q. I am showing you what appears to be an original letter, photostatic copy of which is already contained in Defendant's Exhibit J. This letter is on the letterhead of B. F. Goodrich Rubber Company dated September 25th, 1933, addressed to Spicer Manufacturing Company, attention of Mr. Tarbox. Do you recognize the signature thereon?

A. Yes. That is my signature.

Q. Does your examination of that letter signed by you, enable you to tell us whether or not you know there were fifty each of the seals of Koroseal and Dupreme?

(Deposition of Fred L. Haushalter.)

A. Yes. Gits made the brass rings. They had to be made a certain size. Then he would ship them in to me and we would cure them in the mold.

Q. A copy of the letter therein referred to also September 25th, 1933, to Gits from Goodrich, which I will place in its order. It is already in Defendant's Exhibit J. I show you a copy of a letter which I think will appear, which came from the files of the Spicer Manufacturing Corporation dated November 7th, 1933, addressed to the Goodrich Rubber Company, attention Mr. Haushalter, apparently sent by Spicer Manufacturing Corporation, G. L. Tarbox. Will you examine that and see if you have any recollection concerning it?

A. Well, I recall that Koroseal when it first came out. We did not know much about it and some of our research men were rather unwilling to release it until we had done more work on it. This sealing material was really the first molded job that was ever made of this new synthetic material and the plasticising of it had not been thoroughly worked out; the plasticising of the material chemically, and the research men were hesitant about releasing it, but they later changed their minds when we actually showed them it could be molded.

Q. I show you a letter which for identification has [12] been marked Defendant's Exhibit V, on the letterhead of the B. F. Goodrich Rubber Com-

(Deposition of Fred L. Haushalter.)

pany dated November 15th, 1935, addressed to Spicer Manufacturing Corporation, attention Tarbox, with the legend, B. F. Goodrich Rubber Company, and signed. Do you recognize that signature?

A. That is my signature. At this time,—you see, this is a new material and special equipment had to be set up to produce it and Goodrich was working with National Carbide Company on the plasticizer for the material. A certain amount of material had to be set up to produce it in quantity. Up to this time it had only been produced in extremely small quantities. So the question came up as to whether they were able to go into production at this time because of shortage of facilities for producing it. Unless they had sufficient quantity to start production on, they were not interested, see?

Q. I show you a copy of a letter marked Defendant's Exhibit W for identification. I am advised that this came from the files of the Spicer Company but we shall later see about that, addressed to the Goodrich Rubber Company, and signed for the Spicer Manufacturing Company by Tarbox. Do you know whether or not Spicer was in production on that at that time?

This is November 20th, 1933. I recall that they were in production on the shock absorber at that time.

Q. I show you another copy of a letter from the same source as I am at present advised, con-

(Deposition of Fred L. Haushalter.)

sisting of two pages, [13] and for identification, marked Defendant's Exhibit X. It seems to be addressed to the Goodrich Rubber Company, attention of Haushalter. It seems to be signed Spicer Manufacturing Company, G. L. Tarbox. Do you remember anything about that letter?

A. Well, yes. I recall Tarbox wanted to get away from the Gits seal on account of the patent situation. He thought he was paying a premium for it.

Q. I show you what appears to be a letter marked Defendant's Exhibit Y, for identification from the B. F. Goodrich Rubber Company to G. L. Tarbox, Spicer Manufacturing Corporation. Do you recognize that signature at the bottom?

A. That is my signature.

Q. Do you remember anything about the results of your research division on Koroseal, etc., at that time?

A. This is merely an effort to identify Koroseal positively in the factory by giving it a black color. The original Koroseal material is rather light, transparent, but working in molds in the factory you get discoloration sometimes. Some would be darker than others. Tarbox objected to the discoloration. So we decided to add a little carbon in it and naturally make it black.

Q. I show you a copy of a letter which I understand is from the same source as before, the Goodrich Rubber Company, to the Spicer Manufacturing

(Deposition of Fred L. Haushalter.)

Company, dated June 18th, 1934, directed to the attention of F. L. Haushalter. Do you have any recollection of the oil seal made of the Koroseal sent to you by Spicer at that time? [14]

A. Koroseal is a material which is a basic material mixed with a plasticizer and that plasticizer is removed gradually by contact with thin oil. And that was what was happening here, the thin section of the shaft, the oil in the shock absorber was extracting the plasticizer and stiffened the material.

Q. That was the Koroseal at that time, June 18th, 1934?

A. That is right.

Q. I show you Defendant's Exhibit AA for identification, which I understand is from the same source as before, a letter dated August 20th, 1934, to the B. F. Goodrich Rubber Company from the Spicer Manufacturing Corporation, to your attention. Did you personally know anything about making these tests?

A. The Spicer was making Houdaille shock absorbers for Ford at that time under Houdaille license. In that shock absorber was a sealing member and I suggested to Tarbox that possibly they could work Koroseal out for that application, too, to increase the volume on seals, and he gave me opportunity to send samples for tests in the Houdaille type.

Q. Do you remember distinctly what became of those tests?

(Deposition of Fred L. Haushalter.)

A. Yes. Tarbox installed them in cars around Denver in the wintertime and the damn things leaked. The material is stiff enough at low temperature.

Q. I show you another letter dated January 18th, 1935, which the reporter has marked for identification, Defendant's Exhibit BB. It appears to be a letter from the Goodrich [15] Company to Tarbox, Spicer Manufacturing Corporation. Can you identify the signature on that letter?

A. Yes, that is my signature. While this 3RT-17 is a different Koroseal than the 3RT-14 that we originally started with, we were doing compounding work on the Koroseal to overcome some of the difficulties with the extraction of the plasticizer by oil.

Q. Do you remember what the result on the material was; what changes were made in its composition?

A. I would not swear that the 3RT-17 was finally adopted, but we did improve on the original Koroseal that was submitted.

Q. I show you another letter marked for identification as Defendant's Exhibit CC, dated January 29th, 1935, from the Goodrich Company to Tarbox, Spicer Manufacturing Corporation. Can you identify the signature upon that?

A. That is my signature. Tarbox tested the Houdaille seals both in hot climate and cold climate. I referred previously to the tests in Denver.

Q. Did you have anything to do with those tests?

A. I made the seals for it and he followed the tests.

(Deposition of Fred L. Haushalter.)

I show you a copy of a letter which I understand is from the same source as before, marked for identification as Defendant's Exhibit DD, dated January 30th, 1935, from the Spicer Manufacturing Company to Goodrich Company, attention F. S. Haushalter. Will you tell us what the SK-17198 parts made by you of Koroseal were?

A. That was molded and material we made for the [16] Houdaille shock absorber.

Q. From the same source as before, I show you a copy of a letter marked Defendant's Exhibit EE, marked for identification, dated February 20th, 1933, from Spicer Manufacturing Company to the Goodrich Company, Attention Haushalter. Do you recall anything of your own knowledge respecting that?

A. When we started molding that sealing material, unless we got a sharp edge and a lip at the end, Tarbox would run into leakage and the first one I remember that was molded, he used to cut the lip off with the lathe to get a sharp edge. Then the edge on the molded type was not as sharp as they should be, and he ran into leakage, and that is why he was kicking here.

Q. What was done about that, if you know?

A. We actually set up to cut that lip off after they were molded just to be sure that the edge was sharp.

Q. Mr. Haushalter, with respect to these synthetics that you were using back in 1933 and 1934, has there been any change in them since that time?

(Deposition of Fred L. Haushalter.)

A. Well, the basic material is the same. The difference comes in compounding. We might be interested to overcome that certain difficulty in application. In other words, changing this ingredient or that ingredient, you can change the flexibility or hardness, also.

Q. What about heat resistance?

A. Well, on Koroseal that would not apply because that is not a heat resisting material. It is a thermo [17] plastic. But Duprene which was later called Neoprene was effected by compounding ingredients being introduced.

Q. What was the temperature effects of thermo changes?

A. I might demonstrate by one example. When we first started with Duprene we had trouble with shrinkage, other material causing leakage. Then we discovered that by shrinking the material before it was cured in a heated chamber, then molding it, we would very much overcome that shrinkage difficulty and that made possible the use of Duprene on a great number of seals on this particular job.

Q. I show you Defendant's Exhibit D in this case, an oil seal. Are you familiar with oil seals of that character?

A. Yes. I recognize this molded sealing material as Koroseal made by Goodrich.

Q. Do you recognize the rest of this structure?

A. Also this bronze ring extended into it as being one of the rings that Mr. Gits gave us.

Q. During what time?

(Deposition of Fred L. Haushalter.)

A. I would say along the middle of 1933, in which this work was done.

Q. I will ask you the same in respect to Defendant's Exhibit E. That is not cut open.

A. The sealing material here is also Koroseal made by Goodrich, incorporated into a seal which I recognize as one that Mr. Gits made.

Q. Just one more, Mr. Haushalter, Defendant's Exhibit M. It has three different things upon it. Do you [18] recognize any of them?

A. These three pieces were molded by Goodrich under my direction, incorporating the brass ring that Gits provided. I can identify two of these definitely as Koroseal. I don't exactly identify the third one.

Q. The third one that you point to is the black one? A. Yes.

Q. In the other two, the brown ones?

A. Are definitely Koroseal.

Q. You say the ring is molded right into rubber-like material?

A. That is right, in the mold.

Mr. Haight: That is all.

Cross-Examination

By Mr. Owen:

Q. Mr. Haushalter, no production order was ever received from Gits or Spicer for the Koroseal sealing member such as shown in Exhibits D and E, were they?

(Deposition of Fred L. Haushalter.)

A. This Exhibit D apparently is incomplete. It has no ring in there.

Q. That was not my question. No production order was ever received by Goodrich from either Gits or Spicer to make for production quantities correspond to the sealing member shown in Exhibits D or E?

A. What would you call a production order?

Q. In large quantities?

A. We had orders for several thousand seals from Gits.

Q. Do you have any records of those orders?

A. I have none with me. [19]

Q. Do you know the dates of those orders?

A. I could not swear to the dates.

Mr. Owens: That is all.

(Witness excused.)

Deposition of G. L. Tarbox, taken at the same time and place and under the same stipulation herein before referred to:

G. L. TARBOX

of lawful age, being by me first duly cautioned and sworn as hereinafter certified, deposes and says as follows:

Direct Examination

By Mr. Haight:

Q. Will you give us your full name, please?

A. G. L. Tarbox.

(Deposition of G. L. Tarbox.)

Q. Where do you reside?

A. Todelo, 1428 Sabra Road.

Q. What is your occupation, Mr. Tarbox?

A. Experimental Research Engineer for the Spicer Manufacturing Corporation.

Q. Whose office are we sitting in, taking this deposition? A. My office.

Q. In the plant of what corporation? [20]

A. Spicer Corporation.

Q. How long have you been with the Spicer Manufacturing Company?

A. Since 1919, in November.

Q. How long in your present capacity?

A. Since 1920.

Q. Are you acquainted with Mr. Haushalter who was once connected with the B. F. Goodrich Rubber Company, who just testified? A. Yes.

Q. Do you know Mr. R. J. Gits of Gits Brothers Manufacturing Company, of Chicago?

A. What is the old man's initials?

Q. R. J. Gits, Gitz Manufacturing Company.

A. That is the elderly gentleman?

Q. That is right.

A. Yes. I have known him for years, both he and Mr. Haushalter, before shock absorber questions ever come up,—on other jobs.

Q. Did your company at one time manufacture a shock absorber in connection with which you endeavored to get an oil seal? A. Yes

Q. When did you first manufacture that shock absorber?

(Deposition of G. L. Tarbox.)

A. I would have to look back in the records to tell you just what date.

Q. Well, we will get to it just very shortly. For what concern or concerns were these shock absorbers made? [21]

A. I think our first customer was Hudson and Graham-Paige. I am pretty sure they were the first customers.

Q. Later did you manufacture for other automobile concerns?

A. I am not so sure about that. We made samples for practically all of the different automobile concerns.

Q. We have before you, Mr. Tarbox, a great number of exhibits. Those exhibits run from Defendant's Exhibit O, to Defendant's Exhibit EE. They comprise drawings and copies of letters. Now those are all before you. Do you know where they came from, these particular documents; as you go through that assemblage of documents, you will find some, as for instance, the one now before you, copy of letter July 15th, 1933, that have no identification mark upon them. That is because we have already identified on the record some of these copies. They are identified as Defendant's Exhibit J, but I wish you would examine all of those, too, so when you have done that we will have an answer in respect to all of the exhibits so identified and those included in Defendant's Exhibit J.

(Deposition of G. L. Tarbox.)

Mr. Owen: Before the witness answers, may I ask Mr. Haight, in your question you state a group of letters and drawings. You meant just letters?

A. There are no drawings in this group.

Q. I exclude drawings, I mean letters and copies of letters. [22]

A. These I think came out of my files.

Q. Where is that file kept?

A. In this office.

Q. Is it in this room now? A. It is.

Q. Is it a part of those cabinets in the corner of the room? A. Yes.

Q. Since about the time you received each of them individually or sent originals and kept copies respectively, have they been in your possession in such file? A. They have.

Q. Were they received and filed by you and filed away in the regular course of business?

A. Yes.

Q. Are they a part of the records of the Spicer Manufacturing Corporation? A. They are.

Mr. Haight: I offer all of the letters referred to in the exhibits first identified, beginning with the examination of this witness in evidence.

Q. I now show you a drawing with some writing thereon. A copy of that has already been identified on the records as Defendant's Exhibit B. But unless Mr. Owens finds some reason for wanting the original, we are going to let it go with a copy of the record, but I am showing you the original. Are you familiar with that document? [23]

(Deposition of G. L. Tarbox.)

A. I am.

Q. Can you tell about when it was made?

A. The date that is on there, to the best of my knowledge.

Q. That is June 30th, 1933?

A. That is when I signed it.

Q. Do you recognize the handwriting appearing thereon? A. I do.

Q. Whose handwriting is it?

A. It is mine.

Q. When did you do that writing on this piece of paper?

A. 6/30/33, to the best of my knowledge.

Q. Do you have any recollection as to who made the drawing?

A. Mr. Gits, I think. I am not positive. I am quite sure Mr. Gits made it because Mr. Gits incorporated that in a seal similar to that.

Q. When you say similar to that, you refer to Defendant's Exhibit D, do you not?

A. Yes. It is not exactly like it, but similar to it.

Q. What is the difference?

A. The edge down at the point, or wiping edge.

Q. That is, the small end of this synthetic rubber member?

A. Yes, sir, the small end. [24]

Q. That is different in what respect?

A. Mr. Gits originally had a washer held here like this. Got a piece of paper?

Q. Yes sir.

(Deposition of G. L. Tarbox.)

A. (Witness draws) The sealing member came down like that. That pressed up against that lip and kept it against the piston rod. That is the difference. That is what this point was for. Later on some time during the experiment, he put a coil spring on it.

Mr. Owen: By "this point" the witness pointed to the seal.

A. Right at the end of the lip.

Q. Will you mark this Defendant's Exhibit FF. I am showing you the drawing you just made. It is Exhibit FF for identification. Will you mark the part that you said was a washer that was first made?

A. You mean this?

Q. Yes. Just write "washer." (Witness complies.) Where is the sealing lip?

A. (Witness writes.) We were formerly using a leather seal on that same construction but the oil would go through the leather.

Q. When this drawing was made and this writing done upon Defendant's Exhibit B, who was present, if anybody, besides yourself?

A. That I can't remember. That is too far back. I can't remember.

Q. By that record that you made, according to it, [25] it was Gits and Haushalter, is that right?

A. Yes.

Q. Now, do you remember the occasion of your meeting; how it came about?

A. No. It was too far back. We were all interested in solving this problem with Koroseal and

(Deposition of G. L. Tarbox.)

it was my idea to get Mr. Gits to incorporate Koro-seal in it because the leather let oil go through it.

Q. But ever since this memo was made up on this drawing, you have had it in your possession?

A. It has been in my possession.

Q. Now there is another drawing I wish to show to Mr. Tarbox.

Mr. Owen: I have no objection to the photostat being shown of the original drawing.

Mr. Haight: Thank you very much. We will follow Mr. Owen's suggestion.

Q. Just for the record, we had a drawing yesterday that we did not prove, marked for identification Defendant's Exhibit K, which seems to be a photostat. I am now showing you one of the papers of your files here upon which a drawing appears which seems to be the same paper of which this is a photostat. Can you tell us whether it is or not?

A. It is a photostat of this.

Q. This paper marked Defendant's Exhibit K is a photostat of the original that is now before you?

A. That is right. [26]

Q. Well, we will look at the original. There is a drawing upon that document. Do you know who made that?

A. I did.

Q. There is some writing and some of it with lead lines connected with the drawing. Who made that?

A. I did.

Q. Underneath that are some entries, the first one of which—whose writing is that?

A. That is my writing.

(Deposition of G. L. Tarbox.)

Q. All the way down? A. It is.

Q. And your signature at the bottom?

A. It is.

Q. I notice in that writing the following: "See their letters of 7/19/35 and 7/25/35." July 19, 1935, is a letter that appears in Defendant's Exhibit J. Do you recognize the signature at the bottom of that? A. Mr. Gits' signature.

Q. Is that the letter referred to in your memo upon Defendant's Exhibit K?

A. It apparently is.

Q. I will turn to another letter dated July 25th, 1935. Can you tell us whether or not that is the letter referred to in your memo appearing upon Defendant's Exhibit K?

A. To the best of my knowledge, it is.

Q. I notice upon the letter of July 25th, 1935, from Gits Brothers Manufacturing Company to the Spicer Manufacturing Company, some entries in pencil. Are you familiar with those? [27]

A. Yes sir.

Q. Do you know who made them?

A. I did.

Q. Will you read them?

A. "Seals received 7/26/35. Put four on test, 7/29/35. Run okeh."

Q. From whom was the seals received?

A. From Gits. That is the seal with the coil spring around the bottom.

Q. Yes.

A. It has no reference to the other drawing.

(Deposition of G. L. Tarbox.)

Q. What was the occasion, if you recall, for your making this drawing appearing on Defendant's Exhibit K?

A. As a rule we got new types of seal showing new construction. We made a sketch for the record.

Q. What did you make this sketch from?

A. I sectioned a seal and made this sketch from what I saw.

Mr. Haight: I shall offer in evidence Defendant's Exhibit FF and Defendant's Exhibit K, and the one we did not offer yesterday because I wanted to get some more testimony, Defendant's Exhibit B.

Q. I wonder, Mr. Tarbox, if you are familiar with the structure illustrated in Defendant's Exhibit H? A. Yes. [28]

Q. You notice the legend, "Proposed method of tensioning No. 85 oil seal"? A. Yes.

Q. What, if anything, do you remember about that test?

A. I remember we tested some of those seals.

Q. Have you any record of that test?

A. No. The seal was not successful. We would not bother with it.

Q. What was wrong?

A. This wiper which would not wipe the oil off of the piston rod. The contact must be down at the point. That was the failure.

Q. Are you familiar with this document that I now place before you which we will identify later if you are familiar with it?

A. Yes, I am familiar with that.

(Deposition of G. L. Tarbox.)

Q. Do you know who made those entries?

A. I did.

Q. When did you make them?

A. There is the date.

Q. January 26th, 1934? A. Yes.

Q. What do those entries relate to?

A. They relate to tests on shock absorber seals.

Q. Did you make those tests?

A. Yes, sir, I did.

Q. I noticed that they refer to No. 85. Was that the oil seal, No. 85, shown in this drawing, Defendant's Exhibit H? [29]

A. Yes, I am sure it was.

Q. You made the entries at the time that you made the tests? A. Yes.

Q. And made them accurately?

A. To the best of my knowledge.

Q. What are those entries?

A. To what do you refer?

Q. I want you to read them.

A. One No. 85 Triakall Red. Red was an identification put on there by Mr. Gits, I think, just a dab of paint put on it; left 28,649,000. Ran 4,418,000 strokes. Rod slightly wet. Run 5,600,000 strokes okeh. A lighter spring should be used on the shaft of soft materials. 3½ spring standard washer No. 85 Thiakall hard put on at 28,649,000. Run 5,600,000 strokes okeh. Better than the soft.

(Deposition of G. L. Tarbox.)

Q. What is the next entry?

A. One pair each put on Emrich's car. See road records.

Q. Who is Emrich?

A. An employee of this company.

Q. Do you know where that record is?

A. I could not say for sure.

Q. What is the next entry?

A. One No. 85 Gits soft, 11½ pound spring put on. 3/10/34. Straight 4,000,000 strokes okeh.

Q. And the next one?

A. One No. 85 Gits hard, 3½ spring put on, 3/10/34. [30] Straight 4,000,000 strokes okeh.

Q. The okeh means what?

A. As far as these particular tests were concerned, we thought they were pretty good seals.

Q. When you refer to strokes, that is strokes of what?

A. Piston rod in the shock absorber.

Q. About what was the range of the movement?

A. On our regular test machine we run them 4 inch stroke.

Q. What was the size of the rod?

A. 7/16ths. I might say that No. 85, I don't think it always refers to that particular construction. I am not positive. Mr. Gits records might vary, I am not sure.

Mr. Haight: I do not think it is necessary to offer that. I had it read into the record. I think that will be enough.

(Deposition of G. L. Tarbox.)

Cross-Examination

By Mr. Owen:

Q. Mr. Tarbox, you were shown Exhibit B and asked to compare the sealing element shown there with the sealing element in Exhibit D, and you pointed out the little difference at the end of the sealing lip. You also found a difference in the flange which comes out along the radial part of the case. In the drawing Exhibit B, there is no such flange; that is correct, isn't it?

A. I don't know what you are driving at. You mean down here?

Q. No, along the radial wall of the case there is a flange molded on that sealing element that is not present. [31]

A. Is that molded over or pressed over by compression of this ring?

Q. Well, it looks to me like it was molded over.

A. I could not tell you whether it is one way or the other. It seems to me that the ring forced it over there. I am not sure.

Q. Will you examine Exhibit D a little more carefully and see the mold marks there and see whether that was molded there or pressed out?

A. That is difficult for me to say. I think he got melted material from Goodrich. I am positive.

Q. As assembled in Exhibit D, that sealing element differs from the sealing element shown in Exhibit B, doesn't it, in the shape it is in?

(Deposition of G. L. Tarbox.)

A. In the shape it is in, it is compressed, whether it was like that upper part of Exhibit B, before it was pressed, I don't know. May I offer a word there?

Q. Yes.

A. This seal (pointing to Exhibit D) was made, I think, at our request, because of the height of the shock absorber had to be brought down. We had to shorten the over-all length and with the construction used on the Exhibit B—that the washer necessitated——

Q. Is that like Plaintiff's Exhibit 1 that I am handing you?

A. It necessitated shortening the shock absorber because this had a washer and spring. It was so long. We wanted to cut the thing down short and it was a later effort to make a seal that was short, to do away with this construction [32] here with a washer and then a spring which necessitated the thing being about an inch long over all when it should be about a half inch.

Q. To clear up that answer, the later form made up by Mr. Gits was Exhibit D? A. Yes.

Q. And the earlier form was the one used in the sketch a while ago and was somewhat like Plaintiff's Exhibit 1 except it had a compression washer and a sealing lip on the shaft.

A. Yes, and a spring below it to hold the seal up.

Q. Do you recognize Plaintiff's Exhibit 1 as a seal that you ever used here at Spicer?

(Deposition of G. L. Tarbox.)

A. It is very much like the original samples Mr. Gits sent in before he got to using seal instead of numbers. We used that identical design for a long time.

Q. And the seals like Defendant's Exhibit D never got beyond the sample stage; you never ordered those in quantities?

A. No. We never did. The final test on them showed they were not satisfactory.

Mr. Owen: That is all.

Mr. Haight: Are the signatures of Mr. Haushalter and Mr. Tarbox waived in this deposition?

Mr. Owen: Yes.

Mr. Haight: In regard to Exhibit I, there are two witnesses, their names [33] appearing thereon as Frank Zeman and M. A. Russell. I am asking if you are perfectly willing to stipulate on account on the inconvenience in getting them, that if they were called to the stand, they would testify that they signed their respective names on that drawing on the date it bears, April 16th, 1934?

Mr. Owen: It is so stipulated.

[Endorsed]: Filed U.S.D.C. Jan. 11, 1946.

[Endorsed]: Filed U.S.C.C.A. May 21, 1947.

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil Action No. 23697G

SUIT FOR INFRINGEMENT OF
LETTERS PATENT No. 2,146,677

NATIONAL MOTOR BEARING CO., INC.,
a corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a corporation,
Defendant.

The Depositions of HAROLD H. KLEIN, HUGH
T. STEWART, on behalf of Plaintiff, and
STANLEY C. BATTY, on behalf of Defendant,
taken pursuant to Order of Court and
Agreement at Chicago, Illinois, on June 7th,
A.D. 1946, before Claude W. Youker, Jr.,
Notary Public.

HAROLD H. KLEIN

Direct Examination

By Mr. Owen:

Q. Mr. Klein, what is your full name and address?

A. Harold H. Klein, 1026 Fisher Building, Detroit 2, Michigan. [4*]

Q. What is your age? A. Forty-nine.

Q. By whom are you employed?

A. National Motor Bearing Company.

Q. For how long have you worked for National?

A. Since 1945.

Q. When did you come to Detroit?

A. 1936, February.

Q. And have you been there substantially continuously since that time? A. That is true.

Q. In which National plant did you work before you went to Detroit? A. The Oakland.

Q. Oakland, California? A. Yes.

Q. Which plant was that?

A. That was the 1100 78th Avenue Plant.

Q. That was the main plant? A. Yes.

Q. The main plant at Oakland, California?

A. Yes.

Q. What work did you do when you were with National?

A. Experimental research and development work. [5]

Q. What is your present work?

A. Field engineer, field sales engineer for National.

(Deposition of Harold H. Klein.)

Q. How long have you been doing that?

A. Since coming to Detroit.

Q. I show you two devices which are tagged as Exhibits in this case, as Exhibits 21 and 22 and ask you if you have ever seen those devices before?

A. Yes. I have seen them. I made them.

Q. What are they?

A. Oil seals. I made them in our plant in Oakland.

Q. Do you remember when?

A. In our research laboratory.

Q. Do you remember when?

A. Yes. The dates are right on here, on the tags I put on. 9/20 on No. 22, and 9/4 on 21.

Q. What year? A. '35.

Q. 1935? A. Right.

Q. You say they were tags that you put on. How do you know you put those tags on?

A. Well, at the conclusion of the test the seals were tagged and turned over to Mr. Lloyd Johnson to be placed in his safe. [6]

Q. You have in your hand now Exhibit 21, is that correct? A. That is right.

Q. The small tag attached to that has some writing on it. Is that your handwriting?

A. It is in my handwriting.

Q. Do you remember what date you wrote that on there? A. Yes. 10/7/35.

Q. Does that date have any significance?

A. In what respect?

Q. Well, what happened on that date, 10/7/35?

(Deposition of Harold H. Klein.)

A. Well, the test was concluded and it was turned over to Mr. Johnson.

Q. How long did that test run?

A. A month. A little over a month.

Q. Do you know the date it started?

A. Yes. 9/4/35.

Q. Do you know the result of that test?

A. Very satisfactory.

Q. What report did you give to Mr. Johnson on that test?

A. I gave Mr. Johnson the same report and submitted the written report along with it. [7]

Q. What kind of a test did you give that seal?

A. In a fixture that simulates actual applications, a test fixture.

Q. Of what does it consist?

A. It consists of a head and a body that contains oil, a rotary shaft the speed of which can be varied to suit testing requirements, and we also had means of raising and lowering the oil temperature with the use of steam, and the application of pressure if we required it.

Q. What would you say with regard to the tests that were given this Exhibit 21? Were they tests simulating the usual conditions of the operation of a seal?

A. That is right. They were the regular tests that we would give for a seal about that size for general use.

Q. I hand you a blueprint which is marked as an exhibit in this case, No. 20, and ask you if you have ever seen that before?

(Deposition of Harold H. Klein.)

A. Yes. I made this sketch. Originally it was made to start molds to make samples.

Q. What is the date of that sketch?

A. 5/25/35. [8]

Q. In whose handwriting is that?

A. That is my handwriting.

Q. Who made the sketch? A. I made it.

Q. Of the cross-section of the seal?

A. I made it.

Q. Is the other information on there in your handwriting? A. That is right.

Q. And is that cross-section of the seal substantially the cross-section of the seal of Exhibits 21 and 22? A. That is correct.

Q. I notice a statement on there at the bottom which reads:

“First installed in machine, 9/4/35.”

Does that date agree with any date on any of the tags on these seals?

A. Yes. That agrees with the tag on seal 21.

Q. You mean, Exhibit 21? A. Exhibit 21.

Q. And that was the test that was concluded on 10/7/35? A. That is correct. [9]

Q. I notice a statement on Exhibit 20, this sketch, which says:

“First seal of this type made 9/28/35.”

A. That is an apparent error on my part. That should have registered August, because the seal was actually tested on 9/4. That is, the start of the test was at 9/4 and the conclusion was at 10/7. That should have been registered as August, that “9/28.”

(Deposition of Harold H. Klein.)

Q. In other words, the "9" should have been "8"? A. That is correct.

Q. Is that right? A. That is right.

Q. Have you anything else here in the exhibits of this case to confirm your statement that this seal was made in August?

A. Yes. The regular shop drawings that were made from my sketches indicate that molds were made on 8/13.

Q. 8/13—what? A. 8/13/35.

Q. You are referring now to a group of four prints which are marked——

A. There was an assembly print, I should say.

Q. You are referring to a group of four prints which are marked Exhibit 23?

A. That is right. There was an assembly print, 8/13/35. There was an actual mold print, 8/21/35, and—well, the male and female are both 8/21/35. The details of the case are both 8/13.

Q. Having in mind this date on Exhibit 20 of 8/28/35, which you say is the correct date, does that allow enough time for the mold to have been made to have molded these samples?

A. Yes, definitely.

Q. Do you remember doing it?

A. Yes. I remember the process of making these molds and the actual process of making seals and testing them.

Q. How about the actual making of the seal?

A. I did myself, as far as the molding of the

(Deposition of Harold H. Klein.)

material to the case is concerned. The cases were spun up and prepared under my supervision.

Q. When you took these seals Exhibits 21 and 22 out of the mold, did you do anything to them?

A. Yes. When we took them out of the mold it was necessary to trim a little flash off around the periphery of the case. [11]

That was done by a buffing process, by holding the seal up against a buffing wheel which brought the back side of the sealing element within the case.

Q. Do you remember doing that to Exhibits 21 and 22? A. Yes, I do.

Q. Look at Exhibits 21 and 22 now.

A. Yes.

Q. Are they in the same shape now they were in when you made them and tested them?

A. No, they are not.

Q. What has changed on them?

A. Well, there is a slight raising of the element.

Q. What element?

A. Of the sealing element. That is due to aging and cold flow.

Q. When you say a slight raising of the sealing element, are you referring to the radial face on the back of the sealing member?

A. The radial face on the back of the sealing member is distorted from age and from yielding to the pressure of the spring and the natural cold flow tendencies of the material under such pressure, or [12] any pressures as a matter of fact.

(Deposition of Harold H. Klein.)

Q. When you molded up these seals was any cement applied to the metal before the mold was closed? A. Yes, there was.

Q. Whereabouts was it applied?

A. To the surface of the metal where the rubber would contact.

Q. At the end of the bonding operation was the sealing element cemented as well as bonded to the case?

A. Yes. That was the object in the manufacture of the seal.

Q. Is that still true today with Exhibit 22?

A. Yes. There is a little variation—in some places it seems to be a little loose—but that is the general condition.

Q. What material did you say you used, or did you say? A. We used Thiokol.

Q. When was it you last saw Exhibits 21 and 22 until I showed them to you last night at the Palmer House? A. About ten years ago.

Q. About ten years ago? A. Yes. [13]

Q. And your testimony is that they are not now in the same condition that they were then?

A. That is correct.

Mr. Owen: You may cross-examine, Mr. Haight.

Cross-Examination

By Mr. George I. Haight:

Q. Will you look at Plaintiff's Exhibit 23?

Mr. Owen: 23?

Mr. George I. Haight: Yes.

(Deposition of Harold H. Klein.)

Mr. Owen: That is the four prints.

Q. (By Mr. George I. Haight) (Continued): Plaintiff's Exhibit 23 is made up of four prints of drawings numbered respectively Exhibits 314, 315, 316 and 317. That is correct, is it not?

A. Yes. That is correct.

Q. Will you look at 316 of Exhibit 23.

A. Yes.

Q. That is entitled "Mold Bottom," is it not?

A. That is correct.

Q. 315 is entitled "Mold Top," is it not?

A. That is right.

Q. You said you made those molds as I understood you; is that correct?

A. They were made under my supervision.

Q. Of what were they made? A. Steel.

Q. Now, the material you used to fill that mold was what? A. Thiokol.

Q. Which Thiokol?

A. It was a granular form.

Q. Was it Thiokol "A"? A. Yes.

Q. Had you ever had any experience with Thiokol "A" prior to that time? A. No.

Q. Where did you procure it?

A. What did you say?

A. Where did you procure it?

A. We procured it from the manufacturer.

Q. Did anybody tell you to use that Thiokol "A"?

A. Well, it was presented to me by the management.

Q. By whom?

(Deposition of Harold H. Klein.)

A. Mr. Johnson was the one—Lloyd Johnson was the one who was looking up these materials we were using for our research work at that time.

Q. Did he tell you at that time to use Duprene?

A. Did he tell me at that time?

Q. Yes. A. No.

Q. Did he tell you at that time that Duprene was preferable?

A. I do not recall him making such a statement.

Q. Did you try any other material——

A. Yes.

Q. ——than Thiokol “A”?

A. Yes, we did.

Q. What other materials did you try?

A. Duprene.

Q. Any others in addition to Duprene?

A. No.

Q. But after trying Thiokol “A” and Duprene, the Thiokol “A” was chosen, is that right?

A. The Thiokol “A” blended itself to our particular facilities and that was the material that was chosen.

Q. Now, I wish you would describe in detail the method that you used in filling the mold, in making these oil seals. Was it the same in respect to Exhibits—what are they?

Mr. Owen: 21 and 22.

Q. (By Mr. George I. Haight) (Continued): Was it the same in respect to Exhibits 21 and 22?

A. Yes. The contour, you mean, of the mold?

(Deposition of Harold H. Klein.)

Q. Was the method that you used in making the seal, Plaintiff's Exhibit 21, the same identical method as that you used in making the seal, Plaintiff's Exhibit 22? A. Yes.

Q. Will you describe in detail what you did, starting with the mold.

A. Well, the mold was placed in the press, of course after being filled—it is a bulk factor mold—after being filled to the proper factor. After the case was put in the upper half of the mold was applied and put in the press under heat and pressure and cured.

Q. Did you put anything in the mold before you put the Thiokol "A" in the mold? A. Yes.

Q. What did you put in?

A. We used a substance on the mold to keep the rubber from adhering.

Q. But was there any article that you put in the mold in addition to the Thiokol "A"?

A. Oh, certainly. The case.

Q. Is that represented in these drawings to which your attention has just been called?

A. That is right.

Q. How did you place that in the mold?

A. Well, by dropping it into its proper position.

Q. When you dropped it into its proper position did it assume the position illustrated in Exhibit 316 of Plaintiff's Exhibit 23, the drawing which you have before you?

A. 314 is the drawing that shows the position of the case in the sealing element. Is that what you mean to refer to?

(Deposition of Harold H. Klein.)

Q. No. I am referring to 316. That shows the mold bottom with a structure mounted therein.

A. I do not see any structure in it at all.

Q. Well, did you put that structure in the mold?

A. Certainly. It had to be in there to be molded into the material.

Q. Then when did you put this cement on?

A. The cement was placed on before the case was placed in the mold.

Q. What was the cement?

A. It was some sort of—we used several different kinds, plibond, and one thing or another.

Q. Did you use several different kinds on this particular one?

A. No. I cannot tell you exactly what bond we used on this.

Q. Well, tell us which one of the many it might have been?

A. It might have been plibond.

Q. It might have been what?

A. Plibond.

Q. What else?

A. I do not know just what other cements we had, but we had a number of commercial rubber cements at that time that we were trying, but I cannot tell you which one was on this.

Q. To what thickness did you put it on?

A. It was just spread on with a brush.

Q. Did you treat it after you put it on?

A. The case was degreased and then the material, the cement material, was applied.

(Deposition of Harold H. Klein.)

Q. Did you apply it to all parts of the cup that you placed in the mold?

A. No. Just to the part where the adhesion was to take place.

Q. What part was that?

A. The part where the anchor holes have been provided.

Q. How many anchor holes were there?

A. Well, we used numerous anchor holes. I cannot tell you how many were in this particular one. Sometimes we used more than the print showed.

Q. Do you remember the dimensions of the anchor holes?

A. I do not remember, no. They were one-sixteenth, or a little better, in diameter.

Q. Will you look at Exhibit 317 which is one of the drawings of Plaintiff's Exhibit 23, and see if that helps you?

A. Yes. That looks substantially as it should have been.

Q. What does the legend "8 one-sixteenth holes" mean?

A. Well, as this thing was drawn up there were supposed to be eight sixteenth-inch holes. I remember, however, in making some of these samples that we increased the number of holes. Whether there are eight in this or not, I cannot tell you.

Q. After you had placed the cup in the bottom of the mold, what did you do next?

(Deposition of Harold H. Klein.)

A. We inserted the granular material and the next part of the operation was to place the upper half on for the curing.

Q. This granular material—was it of coarse granules or fine granules?

A. No. It was very finely ground granular material. It flowed very easily.

Q. About how fine was it?

A. Well, I do not know exactly at this time how fine it would average, but I would say it was a thirty-second to a sixteenth of an inch, irregularly shaped.

Q. To what extent did you fill the mold bottom illustrated on Exhibit 316 of Plaintiff's Exhibit No. 23?

A. To what extent did we fill it?

Q. Yes.

A. To the extent that the manufacturer recommended as a bulk factor which was, as I recall it, about two and a half to one, or something of that nature.

Q. When the mold was filled with this Thiokol "A" material, how far up above the face of the mold did it extend?

A. Well, that would be about two and a half times the ultimate thickness of the lip itself.

Q. That would be how high?

A. Well, it would probably be—this is a guess, now, as far as the actual height of the material is concerned, but it would probably be three-quarters of an inch, five-eighths or three-quarters of an inch.

Q. Above the upper face that we see?

A. Yes.

(Deposition of Harold H. Klein.)

Q. Around the outer circumference of the mold?

A. I would say it was about—somewhere between nine-sixteenths and eleven-sixteenths. I, of course, do not remember that detail too clearly.

Q. What did you next do?

A. The next operation was to apply the pressure gradually to allow the material to flow completely around the case, and after the two molds were in their ultimate position, the heat was applied for curing.

Q. Did the pressure come from the descent of the mold top illustrated in Exhibit 315 of Plaintiff's Exhibit 23?

A. That is right.

Q. How far down did you bring the mold top in relation to the mold bottom?

A. The mold came together, as far as the two faces.

Q. Did any of the Thiokol "A" material extrude between the mold bottom and the mold top?

A. No. We did not have that much flash. We figured it closer than that.

Q. There was some flash, was there?

A. Very slight flash around the o.d. of the case as it came out.

Q. But you were assured that the mold was filled with the Thiokol "A" material after you had applied the pressure?

A. Yes.

Q. Is that correct?

A. That is right.

Q. What did you next do?

A. We cured them for about four minutes.

Q. What do you mean by that?

(Deposition of Harold H. Klein.)

A. Retained the assembly under heat and pressure.

Q. How did you apply the heat?

A. Steam.

Q. To what heat did you bring the contents of the mold?

A. It is quite a long while ago to remember exactly.

Q. Do you remember at all?

A. Yes. I think it was somewhere around 250; in that neighborhood.

Q. 250 degrees Fahrenheit? A. Yes.

Q. And you held it at 250 degrees Fahrenheit for about four minutes? A. Yes.

Q. How did you apply the steam?

A. Well, it was a steam platen, upper and lower steam platen.

Q. Did you apply it to the entire mold in its assembled position? A. That is right.

Q. After you had applied the heat for about four minutes, what did you next do?

A. Then we removed the assembly, and removed the completed seal.

Q. And you did that immediately after separating the mold bottom from the mold top?

A. Well, after cooling it sufficiently to handle it.

Q. To what extent did you cool it?

A. Sometimes we dipped it in water and other times we just allowed it to cool until it could be comfortably handled.

Q. At about what temperature was it, do you know?

(Deposition of Harold H. Klein.)

A. You mean, when we went to handle it?

Q. Yes. A. No, I do not.

Q. You say "sometimes." Do you remember what you did in respect to Plaintiff's Exhibit 21?

A. No.

Q. Do you remember what you did in respect to Exhibit 22? A. No, I do not.

Q. Then you took them out, but they were cooled to the extent so that you could handle them, is that right? A. No.

Q. What is the fact?

A. I said that I handled them and removed them after they could be handled, after they were cool enough to be handled.

Q. You cannot tell us about what temperature that was? A. No.

Q. You were doing experimental work at that time? A. Yes, I was.

Q. Did you think that was of no importance?

A. Yes, I did.

Q. You thought it was of no importance?

A. Yes.

Q. Is that right? A. That is right.

Q. Now, what did you next do with these exhibits, Plaintiff's Exhibits 21 and 22?

A. They were tested in our regular testing heads.

Q. Were they both tested?

A. No. Just one.

Q. You remember that, do you?

A. That is right. Just one was tested.

Q. Do you have any memo on it?

(Deposition of Harold H. Klein.)

A. There was a report, as the tag states there, but it seems as though shortly after those were made I was called East to take the place of one of our field engineers and our laboratory was moved, and in the move I lost some instruments that could not be located and also some of the reports I had left when I left hurriedly.

Q. Had you ever at any time furnished those reports to Mr. Johnson?

A. Yes. He has read various reports—that is, not this one, but it was customary for me to submit reports to Mr. Johnson.

Q. But you did not submit the report in regard to Plaintiff's Exhibits 21 and 22, is that the fact?

A. That, I believe, is the fact, because right after I made these tests I had to leave, and the thing did not go through the usual routine of getting them into the records.

Q. Now, will you look at Plaintiff's Exhibit 23, the drawing, and Exhibit 314 thereof?

A. Yes.

Q. Did you make the drawing of which this is a print? A. No.

Q. Who did make it?

A. You mean, did I make the print?

Q. Did you make the drawing?

A. I made the drawing of which this is the print, yes.

Q. Did you make all four of these drawings that are comprised in Plaintiff's Exhibit 23?

A. Did I make these drawings?

Q. Yes.

(Deposition of Harold H. Klein.)

A. No. These were made in our drafting room. I made the original sketches from which these were made, if that is what you are driving at, and the original drawing from which the seal was made.

Q. Is this a blueprint of the sketch or is it a blueprint of a drawing made from a sketch?

A. This is a print made off of my sketch, my original sketch, of which I have a photostat here.

Q. You have a photostat of the original sketch?

A. Yes.

Q. May I see it, please? A. Yes.

Q. That is Plaintiff's Exhibit 20, is it?

A. That is right.

Q. Did you make that sketch before or after these tests to which you have referred?

A. Before.

Q. From what, if anything, did you make that sketch? A. From what?

Q. Yes.

A. From my own imagination.

Q. And this was a product of your imagination, was it? A. Exactly.

Q. Now, looking at that sketch, what is the cross-hatched material appearing in the figure?

A. You mean, the cross-sectional material?

Q. Yes.

A. Well, the upper, darker part, of course, was meant to be metal.

Q. Yes. A. And the bottom, rubber.

Q. What is the circular part?

A. That represents the spring.

(Deposition of Harold H. Klein.)

Q. How long before you made this sketch did you imagine that structure?

A. Well, in collaboration with Mr. Johnson, probably we talked about it on several different occasions. I would say it was probably over a period of thirty days.

Q. But you are the one who finally embodied it in this actual representation of the actual structure?

A. The what?

Q. This representation of the actual structure.

A. You mean, did I make the sketch?

Q. Yes. But that was a sketch of your imagination, you said?

A. That was in collaboration with Mr. Johnson. We worked together on these developments.

Q. He imagined too, did he?

A. He imagined too, yes.

Q. So you did this together?

A. That is right.

Q. Now, what is the relation of the outer face of the rubber material shown in sketch, Plaintiff's Exhibit 20, to the ridge of the cup?

A. What is the relationship?

Q. Yes.

A. You mean, to the back side or the front lip?

Q. To the ridge of the cup which appears at the right, on the northeast corner of the drawing.

A. What is the relationship?

Q. Yes.

A. Well, the back side of the sealing element is within the cup, the ridge of the cup.

(Deposition of Harold H. Klein.)

Q. Where was it in the structure that you made in the mold, Plaintiff's Exhibit 23, Exhibits 316 and 315?

A. That is the upper half of the mold you are speaking of?

Q. Yes, the upper half and the lower half.

A. It was within the structure of the cup.

Q. But it was upon the same plane as the cup bottom, was it not?

A. It was on the same plane, but we used a buffing wheel to remove a slight flash and to bring it within after the molding operation.

Q. Did you use a buffing wheel to remove anything other than the flash?

A. Well, the object was not to remove anything other than the protrusions of the face, to bring it within, and any little flash that may be there.

Q. So upon that structure, the sealing element, the Thiokol "A" material was on the same plane as the bottom of the cup, was it not? It could not be otherwise, could it?

A. What was the question, please?

Mr. George I. Haight: I will state it again.

Q. (By Mr. George I. Haight): The sealing element, to-wit the Thiokol material, was on the same plane as the bottom of the cup?

A. In the mold?

Q. Yes. A. Yes.

Q. And that is the way it stayed, is that not true?

A. No. As I told you, we used a buffing wheel

(Deposition of Harold H. Klein.)

the buff the slight flash that was on there and to bring the back side of this element within the cup after molding.

Q. How much?

A. Just so it was in the clear. Our object there was to be sure that if this seal were used under any conditions where a hub or any lateral—for instance, on an electric motor, where any lateral action of the shaft would bang it up against the hub, or the adjacent machinery, the sealing element would not be damaged. That is why we wanted to bring it at least within the outer case, or the edge of the case.

Q. Have you discussed that with anybody since the time you made these seals, Plaintiff's Exhibits 21 and 22?

A. Yes.

Q. With whom?

A. I talked with Mr. Owen about it.

Q. When?

A. Last night.

Q. Is that the first time?

A. The first time.

Q. From 1935 until last night you had never discussed it with anybody, is that right?

A. We discussed it when we talked about designs for production.

Q. Who discussed it?

A. We did.

Q. Who is "we?"

A. Well, that is, in our manufacturing processes.

Q. Who?

A. In the field, when we were contemplating supplying these to different customers.

(Deposition of Harold H. Klein.)

Q. Whom? You said "we talked." Tell me what you mean by "we."

A. Well, as a matter of discussion, with anybody [33] with whom we happened to be discussing the seal as a sealing element for a product.

Q. This was in the field?

A. In the field.

Q. Did you sell them to anybody?

A. No.

Q. But you discussed it with various people with the intent of selling them, is that the idea?

A. Yes, that is right.

Q. But nobody bought?

A. Well, we were not ready to go into manufacture, because we did not feel——

Q. Answer me. Nobody bought. That is true, is it not? A. Yes. That is true.

Mr. George I. Haight: All right.

Q. (By Mr. George I. Haight): Now, was that part of your imagination, to do that buffing?

A. That is right.

Q. To what extent did you depress the Thiokol "A" material in the buffing?

A. I never measured it, of course.

Q. Ten-thousandths? [34]

A. We did not depress it at all.

Mr. George I. Haight: That is what I thought.

Q. (By Mr. George I. Haight): Why didn't you say so in the first place?

A. What do you mean?

Q. That you did not depress it at all ?

(Deposition of Harold H. Klein.)

A. What do you mean? Why would I——

Q. I mean exactly what I say. Why didn't you say in the first place that you did not depress it at all? That is the fact, is it not? You did not depress it at all?

A. I do not understand what you are talking about.

Q. I am afraid you are taking refuge in that observation.

A. I am not taking refuge in anything. There was no compression when we buffed those seals.

Mr. George I. Haight: That is also just as I thought.

Mr. Owen: There is no contention otherwise, Mr. Haight.

Mr. George I. Haight: Oh, yes.

Mr. Owen: No. [35]

Mr. George I. Haight: The affidavit of one Mr. Owen contains a contention otherwise.

Mr. Owen: I beg to differ.

Mr. George I. Haight: If you have forgotten, I will read it to you.

Mr. Owen: I beg to differ.

Q. (By Mr. George I. Haight): Now, you have a distinct recollection now of having made a test of Plaintiff's Exhibit 21?

A. That is right.

Q. And you have not discussed it with anybody from that time up until last night, but you remember it very definitely at the present moment, do you not?

A. Yes. Why shouldn't I?

Q. What is there about Exhibit 21 that gives you that definite recollection?

(Deposition of Harold H. Klein.)

A. Well, I made it. That was my duty, and that is what I was employed for, to do that type of work. Why shouldn't I recollect it?

Q. I am asking you. A. O.K.

Q. Why do you recollect it? I will ask you that? [36]

A. I recollect it because I made it.

Q. And because it was a product of your own imagination, is that it? That impressed itself upon you, is that right?

A. It was a product of my imagination in conjunction with those with whom and for whom I was working.

Q. Well, now, who other than Mr. Johnson?

A. Mr. Johnson and myself collaborated closely on this.

Q. Who else among those others with whom you were working? A. That is all.

Q. How long did you test Plaintiff's Exhibit 21?

A. Thirty days. A little over a month.

Q. It ran continuously during that time?

A. That is right.

Q. Did you have anything adjacent it on the shaft on which you ran it?

A. Did I have anything adjacent it?

Q. Yes.

A. Sure. We had what we called a plug the right size and a hub. [37]

Q. Did you have any adjacent moving part?

A. No.

Q. When you tested it?

A. No. No adjacent moving part.

(Deposition of Harold H. Klein.)

Q. You did not test Plaintiff's Exhibit 22?

A. No.

Q. You are sure of that, are you?

A. Definitely.

Q. You have an independent recollection of that right now? A. Very definitely.

Q. Have you discussed that with anybody since 1935? A. No, I have not.

Q. You did not even discuss that last night, did you? A. No, I did not.

Q. When you saw Plaintiff's Exhibit 22 you at once recognized it? A. That is right.

Q. As one that you had made?

A. That is right.

Q. And you at once remembered that you had not tested it, is that correct? [38]

A. That is right.

Q. And you had not discussed that matter with anybody at any time over all of these years; that is correct, is it not?

A. I had no occasion to discuss it.

Q. I did not ask you that. I asked you if you did. A. O.K.

Q. And you did not? A. I did not.

Q. You said that these were to be put in Mr. Johnson's safe, is that right?

A. That is right.

Q. Do you know whether that was done or not?

A. I know it was done with this (indicating), but that was made for a sample for Mr. Owen.

(Deposition of Harold H. Klein.)

Q. When you say "done with this," what do you mean? What are you referring to?

A. This one (indicating) was placed in Mr. Johnson's safe.

Q. Which one is that?

A. That is No. 21.

Q. Did you know what was done with the other one? [39]

A. The other one was made for the express purpose of submitting it to Mr. Owen.

Q. Was that done? A. That was done.

Q. You remember that, do you?

A. I did not hand that to him. It was given to Mr. Johnson to give to him.

Q. Whether it was given to Mr. Owen or not, you do not know? A. No.

Mr. George I. Haight: All right.

Q. (By Mr. George I. Haight): Now, as you look at Plaintiff's Exhibit 22, how far out does the Thiokol "A" material extend beyond the plane at the bottom of the cup?

A. Well, it varies. I would say it protrudes ten or twelve thousandths in some places.

Q. How much?

A. About ten or twelve thousandths, maybe; in that neighborhood.

Q. Now, you have given the reason why that is extended, have you not, in your direct testimony?

A. I have given the reason that it has cold flowed, yes. [40]

Q. And what are the reasons?

(Deposition of Harold H. Klein.)

A. The material over a period of years has cold flowed due to aging and pressure exerted by the spring causing distortion.

Q. At the time that you made this was the ceiling element, the Thiokol "A" material, securely attached to the cup? A. That is right.

Q. And did it remain so during your test?

A. That is right.

Q. During your test of Plaintiff's Exhibit 21, to what temperatures would that material go?

A. Oh, the oil temperatures probably would run up to 195 or 200, I would say.

Q. Fahrenheit? A. Yes.

Q. Would that in anywise affect the Thiokol material, the Thiokol "A" material?

A. It did not make it leak.

Q. What?

A. It did not make it leak.

Q. Did it in anywise affect the material?

A. No.

Q. That heating did not change it in any regard, [41] in your opinion?

A. Not that we recorded.

Q. In your opinion did this cold flow affect the entire Thiokol "A" structure? A. Yes.

Q. When did you first become acquainted with Thiokol material?

A. When it was presented to me for use in this seal.

Q. You never had any experience with it before?

A. No.

(Deposition of Harold H. Klein.)

Q. What was your work before you went with the National Motor Bearing Company?

A. I was consulting engineer for the United States Fuel & Utilities Company, building a plant in Los Angeles, to make a smokeless fuel out of petroleum coke, or residium.

Q. What had been your education?

A. I served an engineering apprenticeship with a railroad and did some work in I. C. S. on mechanical engineering.

Q. Are you a chemist? A. No.

Q. Do you know of any other synthetic rubber [42] material that cold flows?

A. In our experience they all do, more or less.

Q. What about Duprene?

A. It has some cold flow.

Q. The use of Duprene would not solve the problem of cold flow then, would it?

A. Well, I am not a chemist. I certainly could not answer that one.

Q. But you can answer it when it comes to Thiokol "A," can you not?

A. Because I used it.

Q. Have you any other basis for what you have said except the fact that you used it in making these seals that you have been referring to, and that you now say are different from what they were before?

Have you any other basis of knowledge?

A. No, other than the fact that the Thiokol liter-

(Deposition of Harold H. Klein.)

ature indicates that cold flow is one of its characteristics.

Q. I understood you to say awhile ago you had Duprene, is that right?

A. Yes. We have tried Duprene, but there is no Duprene in this particular sample.

Q. How did you learn that there was cold flow [43] in Duprene?

A. Because we made seals out of it. We made other constructions besides this.

Q. Did you discuss with Mr. Johnson back in 1935 the matter of cold flow in Duprene?

A. No. As a matter of fact, I have no recollection of having any specific discussion with Mr. Johnson relative to the properties or cold flow of Duprene in that year.

Q. Tell me specifically why you did not use Duprene and used instead Thiokol "A."

A. I can tell you that, yes.

Q. Yes.

A. The reason is that our facilities lended themselves to the Thiokol material. As I understood it at that time, the Thiokol material had already undergone some sort of a precure that made it cure more rapidly.

Q. Now, will you look at Plaintiff's Exhibit again, the drawing, Exhibit 314. That shows the sealing element, does it not? A. 314, yes.

Q. And you say that over all these years that element has been affected by cold flow. What would [44] cold flow do to that element? Just tell us by looking at the drawing.

(Deposition of Harold H. Klein.)

A. You want me to describe what cold flow would do to that element?

Q. Yes.

A. The tension of the spring would pull the lip toward the shaft, or where the shaft would be, toward the center, and that in turn would make the material flow around a pivot point, namely the case pierce, and build up outside the case, build up in height outside of the case, and that is exactly what has happened.

Any description beyond that will have to be made by a chemist. That is my appraisal of the situation.

Q. How would it build up in the area—still looking at the drawing—between the metal cup element and the lower face as it appears in the drawing, of the sealing element?

A. The pressure of the spring and the cold flow action of the lip—it definitely shows that, if you would like to hold a scale across the face of the exhibit.

Q. You say that would affect that part of the [45] material that is adjacent the flange of the cup and between it and the bottom of the sealing element as it appears in Exhibit 314 of Plaintiff's Exhibit 23, is that right?

A. But definitely.

Q. Would there be cold flow on the other side of the flange, too?

A. Well, I will say that there is. Whether it has any compression or not, I do not know. A chemist will have to answer that.

(Deposition of Harold H. Klein.)

Q. Would there be cold flow if there had been no spring upon it? A. Yes.

Q. So, without the spring there would have been cold flow? A. That is correct.

Q. And would that cold flow occur at room temperature of the material?

A. I cannot answer that. You had better ask a chemist about that.

Q. Without the pressure of the spring due to cold flow would the Thiokol "A" material expand or would it shrink?

A. I cannot answer that one. I cannot answer [46] that one.

Q. The reason you cannot answer it is that you do not know, is that it? A. That is right.

Q. Do you know whether that material without any spring shrinks at all or not? A. No.

Q. Don't you know it would not shrink over one per cent?

A. Well, that was not my job, to know all the physical properties of that material at that time.

Q. Now, you said you had read the literature of the Thiokol Company.

A. That is right. We had to know something about the characteristics to see whether it was even remotely satisfactory to be used in an oil seal and we knew what we were up against in the way of cold flow when we used the material.

Q. Did the Thiokol manufacturers tell you any way to bond Thiokol "A" to metal in 1935?

A. No.

(Deposition of Harold H. Klein.)

Q. Or at any other time?

A. Not to my recollection.

Q. In your experience in this field do you know [47] of Thiokol "A" having been used for a sealing element in an oil seal anywhere?

A. Not to my recollection.

Q. And you have been in the business constantly, have you not?

A. You are speaking of 1935 now?

Q. 1935, on up to the present time.

A. Well, I have divorced myself from that type of activity as of my trip east, and that duty was taken over by another. My duties with the company changed at that time.

Q. Now, you made a test of Plaintiff's Exhibit 21. There was a spring on at the time it was tested, was there? A. There was what?

Q. A spring? A. Yes.

Q. A coil spring, a garter spring? A. Yes.

Q. What was the size of the shaft on which that was tested? A. I have not a record of it.

Q. I beg your pardon.

A. I have not a record of it. [48]

Q. But you have such a recollection. Don't you remember?

A. No. I do not remember what size shaft this was tested on.

Q. Well, take a look at Plaintiff's Exhibit 23, Exhibit 316, and see if you can tell from that.

A. I would say it was tested on about a one and nine-sixteenths shaft. That is an estimate.

(Deposition of Harold H. Klein.)

Q. What was the coil diameter of the spring?

A. I do not know, but I can "mike" it for you, if you want me to.

Q. All right. Please do so.

A. That is 134/1000, o. d.

Q. 134/1000? A. Yes.

Q. What was the wire diameter?

A. You will have to get me a pair of pliers if you want to know that. I will have to cut the spring to find out.

Q. Don't you remember that?

A. No, I do not.

Q. Why not? A. Why should I?

Q. Why should you remember these other things [49] you have not thought of for nearly 11 years? I will ask you that one.

A. Well, those are details one does not ordinarily carry in their mind when you are not in direct contact with the work every day. I might answer you in that manner.

Mr. George I. Haight: Yes. That is a very good observation.

The Witness: Thank you.

Mr. George I. Haight: Is there any objection to having the witness determine the wire diameter of the coil?

Mr. Owen: May I ask Mr. Aukers if it can be done by uncoiling the two ends of the spring?

Mr. Aukers: We can do it. It can be done.

Mr. Owen: Why don't you do that?

(Deposition of Harold H. Klein.)

Mr. Batty: I tried to get the spring apart, and I was not able to do so.

Mr. Owen: Is it rusted together?

The Witness: I think I can do it without destroying it, if you want it done.

Mr. Owen: Just describe to us first how you are going to do it. I do not want the exhibit changed any. [50]

The Witness: I am going to put a little tension on it to free the nib, as we call it, and then I am going to uncoil it.

Mr. George I. Haight: All right. I think that is all right, don't you?

Mr. Owen: Yes. That is all right.

The Witness: No. It will not yield.

Mr. Owen: Have one of your men try it, Mr. Haight, and see if he can get it apart.

The Witness: Be careful not to stretch the spring.

Mr. George I. Haight: Off the record.

(Discussion off the record.)

Mr. George I. Haight: Is there any value in the suggestion of taking Plaintiff's Exhibit 22?

Mr. Owen: I am not sure. Mr. Haight, that they are the same weight of spring. I rather doubt if they are.

Mr. George I. Haight: Can you, Mr. Aukers, determine the wire diameter of either of these Plaintiff's Exhibits 21 and 22?

Mr. Aukers: To get the wire diameter you will

(Deposition of Harold H. Klein.)

have to slip it and pull out all the coils, [51] and in that way it would be destroyed. We can count the number of coils and do it that way. We can count the number of coils and from the I. D. and O. D. we can get it very closely.

Q. (By Mr. George I. Haight): Did you use the same springs on each of these exhibits, Plaintiff's Exhibits 21 and 22?

A. No, I do not think so.

Q. Why did you use different springs?

A. Well, we varied our spring tension from time to time. As a matter of fact, we were developing spring tensions at that time for use with synthetic rubbers.

Q. Do you know now that the spring tension on one is different from the spring tension on the other?

A. From my observation of them, they are.

Q. Do you know the length of that spring?

A. The developed length, I do not know.

Q. Do you know whether or not that is different on 21 from what it is on Plaintiff's Exhibit 22?

A. No. It would be a simple matter to get it if we could get them uncoiled, but apparently they are not easy to open.

Q. Do you know what the name of this wire was that you used? A. No.

Q. Or its grade, its temper or any of those things?

A. It was the same wire we were currently using in production on leather seals at that time.

(Deposition of Harold H. Klein.)

Q. Do you know what the radial pressure was on the garter spring installed on the sealing element of the exhibit, Plaintiff's Exhibit 21?

A. No, I do not.

Q. How long would that radial pressure endure in that spring?

A. I cannot answer that one.

Q. It would be different when the seal is on a shaft, from what it is when it is not on a shaft, would it not? A. Yes.

Q. Now, is it your opinion that this cold flow has been going on from the fall of 1935 up until the present time from Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22?

A. Yes. That is my belief. I think it will [53] continue to go on in the form of disintegration and deterioration.

Q. How much of it would go on during the first three years, let us say from the fall of 1935 to the fall of 1938?

A. I cannot answer that one. You will have to ask our chemist about that.

Q. If it is going on all of the time there would be some during that period would there not?

A. It would be reasonable to assume that.

Q. You have not any idea that there was not any cold flow from 1935 until, let us say, December, 1938, and then the cold flow started, have you?

A. I am not really qualified to answer that accurately.

(Deposition of Harold H. Klein.)

Q. What made you qualified to say it was cold flow that changed the dimensions of this thing, as you say?

A. It is obvious. The condition of the seals illustrates that. The seals illustrate that themselves.

Q. But what makes it obvious to you that it is cold flow, since you just now say you know nothing about it? I want to match those two answers and give [54] you an opportunity to explain it.

A. Will you state that again please?

Q. You said you know nothing about cold flow.

A. I did not say I do not know anything about cold flow, but I am not expert or no chemist on cold flow.

Q. When I asked you the basis of your statement that it was cold flow that has caused what you say is a change in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22 from 1935 up until the present time——

A. Yes.

Q. ——you said it is due to cold flow.

A. That is right, because we expect a certain amount of that, because the supplier said in their literature that one of the inherent qualities of the material was cold flow, and that naturally we would have to live with it and try to use it.

Q. You knew that at the time you used it in 1935, did you?

A. Yes, sure.

Q. Now, would you expect a different cold flow in Exhibit 21 from that in Exhibit 22?

(Deposition of Harold H. Klein.)

A. Well, one seal was tested and the other was not, so I imagine there would be some difference.

Q. And what difference?

A. Whatever difference the testing temperatures might have on it.

Q. Where would you find the greater cold flow, in 21 or 22?

A. I should say in the one that was tested. What number is that?

Q. 21. A. Yes, 21.

Q. Do you know what the radial pressure on the garter spring was, installed on the sealing element of Plaintiff's Exhibit 21?

A. No, I do not.

Q. Will you look at Plaintiff's Exhibit 21 and tell us the dimension of the sealing lip as you measure it at this time?

A. You mean the i. d., inside diameter?

Q. Yes.

A. I cannot seem to read these figures. May I have that glass a second, please?

This thing varies all over the lot. How accurate do you want this?

Q. Just as accurate as you can give it. [56]

A. All right.

(Discussion off the record.)

A. (Continued): It seems to be about 1.430.

Mr. Owen: What was the dimension?

The Witness: 1.430.

(Deposition of Harold H. Klein.)

Q. (By Mr. George I. Haight): Which dimension is this? A. Inside.

Q. What is the answer?

A. 1.430. It is so ragged that it is hard to get it accurate, absolutely perfect. It is hard to get an absolutely perfect dimension.

Q. Do you in your work use a Vernier?

A. Yes.

Q. You know how to use one? A. Yes.

Q. You know how to use one? A. Sure.

Q. Do you know whether the coil garter springs on Plaintiff's Exhibit 22 and Plaintiff's Exhibit 21 are of the same length? A. No, I do not.

Q. You do not have any recollection about that?

A. No, I do not.

Q. Would a difference in length make a difference [57] in pressure?

A. It so happens that in our development of springs we worked on a per lineal inch tension. That is the way we developed our springs, so many ounces per lineal inch.

Q. How many ounces?

A. That depends upon the size of the seal and what we wanted to do with it.

Q. Well, do you remember what you did in respect to the particular seals here in question?

A. I do not.

Q. Plaintiff's Exhibits 21 and 22?

A. I do not remember the tension at all, exactly.

Q. Going back to Duprene and Thiokol, is there any advantage in Duprene over Thiokol "A"?

A. I do not know.

(Deposition of Harold H. Klein.)

Q. Do you know what difference there is in cold flow between those two materials?

A. No, I do not.

Q. Would you call Thiokol "A" "a composition such as Duprene"?

A. I am not qualified to go into the composition of the two materials.

Q. How is it that you remember so well that you [58] heated the mold in the making of Plaintiff's Exhibits 21 and 22 up to about 200 degrees Fahrenheit?

A. What is it?

Q. How do you remember it so well?

A. I remember we had to heat it to cure it, to make the seal.

Q. What did you say you heated it to, to what temperature?

A. I told you that I do not know accurately, but I made a guess of about 250. It would be somewhere between 250 and probably 300; in that neighborhood some place.

Q. Well, about 300 would be a better temperature, would it not?

A. I would not say accurately, but that would be my guess; in that neighborhood some place.

Q. Does its plasticity change with temperature, Thiokol "A"?

A. I think all of them do, with temperature.

Q. As you cool it down, when does it really begin to stiffen within your experience, as you recall it, on Plaintiff's Exhibits 21 and 22?

A. I never made any tests. I do not know.

Mr. George I. Haight: That is all. [59]

(Deposition of Harold H. Klein.)

Redirect Examination

By Mr. Owen:

Q. Mr. Klein, do you know what became of that test report, No. 109, after you left to come to Detroit?

A. No, I do not. As I said, when I returned to move to Detroit, many of the records were lost in the moving of the laboratory, along with some of my instruments.

Q. Do you know whether or not Mr. Johnson ever saw it? A. No, I do not.

Q. I want to clear up, Mr. Klein, in what sense you used the word "imagining" and "imagination." I want to read to you the claim from the Johnson Patent, and ask you whether you or Mr. L. A. Johnson thought of these different things.

Who thought of using "a cup member having a peripheral portion and an axially inwardly offset radial flange"?

A. That was Mr. Johnson.

Q. Who thought of using "a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom"?

Mr. George I. Haight: I wish to call the Court's attention to the fact that these questions are most grossly leading. The proper thing is to ask the question, and not lead the witness by reading the claim.

Mr. Owen: I am reading from the claim, Mr. Haight.

(Deposition of Harold H. Klein.)

Mr. George I. Haight: That is what I am objecting to. It is leading. Why don't you ask the witness what elements he conceived and what elements Johnson conceived?

Mr. Owen: I am perfectly willing to ask him that question.

Mr. George I. Haight: Certainly. That is a proper question.

Q. (By Mr. Owen) (Continuing): What elements did you conceive and what elements did Mr. Johnson conceive?

A. My contribution to the thing was the bonding of the element to the case to make a two-piece oil seal out of it.

Q. You mean in the manufacturing of it?

A. That is right.

Q. In making it? [61] A. Yes.

Q. I want to read to you this part of the claim: Who thought of having——

Mr. George I. Haight: I again object. It is perfectly improper. The ground of the objection is, it is plainly leading. You go ahead and do what you please, but the answers will be worthless.

Q. (By Mr. Owen) (Continuing): Who thought of having the molded resilient sealing member bonded to both sides of the radial flange at the offset "so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset"?

A. That was Mr. Johnson.

Q. That was his idea? A. That is right.

(Deposition of Harold H. Klein.)

Q. Well, then, in what sense did you use the word when you said that in the preparation of your sketch, Exhibit 20, some of your imaginings went into that sketch?

A. That can be illustrated by this sketch of the mold here on this—what do you call it? Exhibit—

Q. Exhibit 20.

A. On Exhibit 20 I show here a section of the mold positioned into the case and contoured like the sealing element as an illustration of how this seal could be molded with two pieces plus a spring—in two pieces plus the garter type spring.

Q. Then as I understand it, your imagination went into the fabrication of it?

A. That is right.

Q. The way of making it?

A. That is right.

Mr. Owen: That is all.

Mr. George I. Haight: Just a minute.

Recross-Examination

By Mr. George I. Haight:

Q. Now, Mr. Klein, you are familiar with this claim of the Johnson Patent, are you?

A. No.

Q. Counsel for plaintiff asked you regarding certain elements. Now, I wish you would tell us without the patent claim before you what elements you presented and what elements Mr. Johnson presented? Just tell us.

A. We were working on the development of the simplest possible type of synthetic oil seal with

(Deposition of Harold H. Klein.)

the least possible number of parts and the lowest possible manufacturing cost.

In connection with that the outer case was suggested by Mr. Johnson and the bonding of the material to the case was presented by myself and illustrated in this sketch, Exhibit 20.

In addition to the contouring of the seal I sketched a cross-section, a small portion of the cross-section of the mold, pointing out the advantages of such a seal and showing how it could be molded. That just about covers it.

Q. Now, what do you mean by "bonded"? That was your idea. What did you mean by "bonded"?

A. It would be a mechanical application to the metal part.

Q. And you used cement for bonding as you made this, is that right?

A. That is right.

Q. And that bonding idea was yours?

A. The application of the material to the steel was mine. The application of synthetic material to the steel was mine. That is, the mechanics of the thing was mine. [64]

Q. The outer case was Johnson's idea?

A. That is right.

Q. Whose idea was it of having an offset flange?

A. Mr. Johnson's.

Q. Did you have any other ideas that you contributed to that structure in addition to the bonding?

(Deposition of Harold H. Klein.)

A. Any other ideas in addition to the application of the synthetic material?

Q. Yes.

A. No. Naturally when you are working as a development man you have all sorts of ideas about a new product, but that was my contribution to this particular development.

Q. How long were you developing this before any tests were made?

A. This particular seal?

Q. Yes.

A. Oh, I think about 30 days.

Q. Did anybody work with you in making that development?

A. Yes. I had help around there.

Mr. George I. Haight: That is all.

Mr. Owen: That is all.

(Deposition closed.) [65]

HUGH T. STEWART

Direct Examination

By Mr. Owen:

Q. What is your full name and address, Mr. Stewart?

A. Hugh T. Stewart, 1212 Whipple Avenue, Redwood City, California.

George I. Haight: What city?

The Witness: Redwood City.

Q. (By Mr. Owen): By whom are you employed, Mr. Stewart?

(Deposition of Hugh T. Stewart.)

A. National Motor Bearing Company.

Q. In what capacity?

A. Director of Research.

Q. For how long have you worked for them?

A. A year and a half. [67]

Q. By whom were you employed before that?

A. The Arcadia Synthetic Products Division of the Western Felt Works.

Q. What business were they in?

A. They manufactured so-called plastics and synthetic rubber products.

Q. Where did you work before that?

A. I worked for Keasbey & Mattison Company at Ambler, Pennsylvania.

Q. What do they make?

A. Rubber and asbestos goods and brake lining.

Q. What phase of it did you work on?

A. I reorganized their packing department. It involved asbestos textiles and rubber developments.

Q. Where did you work before that?

A. Garlock Packing Company.

Q. What business are they in?

A. They are in the manufacture of mechanical packings and oil seals.

Q. Mechanical what?

A. Packings and oil seals.

Q. Do you remember about what years you were with Garlock?

A. From 1934 until early 1938. [68]

Q. Where were you before you were with Garlock?

A. I was in business for myself.

Q. Whereabouts?

(Deposition of Hugh T. Stewart.)

A. In Jersey City, New Jersey and Union City, New Jersey.

Q. For how long? A. For eight years.

Q. And where were you before that?

A. Bell Telephone laboratories.

Q. Going back to the time you were in business for yourself what was the nature of your business?

A. I made molded asbestos and rubber packings.

Q. When you were with the Bell Telephone Laboratories what years were those?

A. 1923 to 1926, I believe.

Q. What work did you do then?

A. That was on rubber development, primarily, for the Western Electric Division of the Bell Telephone System.

Q. Did you have any experience prior to 1923 with rubber development? A. No.

Q. Have you ever worked with a material known as Thiokol? [69] A. Yes.

Q. Do you remember when you first became acquainted with Thiokol?

A. Well, I am a little hazy on this, but I first met Dr. Patrick, I believe, in 1929.

Q. Who was Dr. Patrick?

A. He was the discoverer or inventor of Thiokol.

Q. Did that have anything to do with your becoming acquainted with Thiokol material?

A. Yes.

Q. Explain what you mean.

A. I got samples at that time to evaluate and see whether it had any possibilities for use in my own business.

(Deposition of Hugh T. Stewart.)

Q. And that was what?

A. The manufacture of asbestos and rubber packings.

Q. What tests, if any, did you make with Thiokol in connection with your own business?

A. Well, my interest at that time was in rubber compounds in solution in the form of cements, and that sort of thing, and my work mainly was in the devising of solvents or obtaining of solvents that would put Thiokol in a cement condition.

Q. Did you ever do any other work with Thiokol?

A. Yes. I have molded Thiokol and skimmed and frictioned Thiokol on cloth. We did quite a little work with Thiokol at Garlock Packing Company.

Q. That was during what years?

A. 1935 to 1938, I believe.

Q. Did you ever do any work with Thiokol "A?"

A. Yes.

Q. Did you ever do any work with Thiokol "A" in granular form?

A. Not at that time. I have since done some work with Thiokol molding powders.

Q. Can you tell from looking at Exhibits 21 and 22 whether or not—or what material they are made of?

A. Well, I would say from the smell of them they are Thiokol "A."

Q. Looking again at Exhibits 21 and 22, did you hear the testimony of Mr. Klein that when those

(Deposition of Hugh T. Stewart.)

were made the radial back face of the sealing member was within or flush with the bottom of the case?

A. In the same plane you mean?

Q. Yes. In the same plane. A. Yes.

Q. Are they in that condition now?

A. No. 21 is not.

Q. What is the condition of No. 21, before you go on and test No. 22?

A. Generally it is badly distorted.

Q. What is the condition of the radial face of the *ceiling* element? What kind of distortion is it? Which way is it moved?

A. It is moved inwardly, and—shall I call it upwardly?"

Q. Inwardly and outwardly, do you mean?

A. Well, out of the plane of the case, yes.

Q. It sticks out beyond the plane of the bottom of the case? A. Yes.

Q. Is that right? A. Yes.

Q. Now, will you look at Exhibit 22 and see what condition that seal is in?

A. The same condition exists there, but to a lesser extent, I would say.

Q. You mean, there is less distortion on Exhibit 22? A. Yes.

Q. Than on Exhibit 21? [72]

A. That is right.

Q. How do you account for that distortion?

A. Well, I believe that the distortion has been caused by the pressure, the force that has been ap-

(Deposition of Hugh T. Stewart.)

plied by this circumferential spring here, which has caused the molded part to cold flow.

Q. Is that true on both exhibits?

A. It becomes more or less set.

Q. Is that true on both Exhibit 21 and Exhibit 22?

A. It is very marked on Exhibit 21. Can I measure this?

Q. Yes. Make any measurements or comments you want. I want the record to be complete on your observations.

A. The distortion of the unit represented by Exhibit 21 is much greater than on Exhibit 22, very much greater.

Q. You say there is very much greater distortion on Exhibit 21 than on 22? A. Yes.

Q. How do you account for that?

A. Well, the previous testimony was that No. 21 had been tested in hot oil, which no doubt accelerated [73] that condition, particularly if the test was above 150 degrees.

Q. Why do you say "150?"

A. Or even 125, for that matter.

Q. Why do you say 150 or 125?

A. Well, Thiokol will cold flow at room temperature and any increase above room temperature just accelerates that property.

Q. Does the presence of the spring have anything to do with cold flow?

A. The force of the spring further accelerates the cold flow.

(Deposition of Hugh T. Stewart.)

Q. Will you take Exhibit 21 first, the one which you say has had the maximum distortion.

A. Yes.

Q. Would you explain what evidence you see there of cold flow, referring to the various parts where you find it in evidence, and what it has done to the various parts of the seal.

A. Well, from looking at the drawing, Exhibit 314——

Q. Which is Exhibit 23?

A. ——which is Exhibit 23, that shows a nominal inside dimension of 1.516.

Q. That is the shaft hole? [74]

A. That is the shaft hole.

Q. Would you check the mold before you go further and see whether or not the mold would have produced a sealing flange with that size of a shaft opening?

A. According to the drawing it should have.

Q. Which drawing are you looking at?

A. Exhibit 315. The same dimension is shown on the mold drawing as on Exhibit 314, so the piece that came out of the mold should be substantially within the tolerances that are shown on there.

Q. What tolerances are shown?

A. Ten thousandths of an inch.

Q. Plus or minus ten thousandths?

A. No. Plus or minus five thousandths; ten thousandths over all.

Q. Will you continue with the measuring you were doing and answer my question?

(Deposition of Hugh T. Stewart.)

A. Well, at one point the i. d. shows 1.296, and you could get almost any variable from that, any variation from that that you want, up to 1.343.

Q. Now, that is because of what?

A. The force applied by that spring, tending to turn this thing inside out.

Q. Turn what thing inside out? [75]

A. The sealing element. The spring wants to pull that rubber down there and the rubber is allowing the spring to do it.

Q. These different dimensions which you just read off are measurements of the opening of that shaft hole in the sealing element, is that correct?

A. Yes.

Q. The measurements vary, and what conclusion do you draw from that?

A. That the force applied by the spring has caused the distortion in the sealing element.

Q. How has that been manifested, if at all, in any other part of the seal?

A. Well, it shows up in the back, and apparently the force of that spring pulling the sealing element inward and downward, or upward, whichever the case is here, makes the rubber cold flow and there is a bulge up here (indicating).

Q. You mean, a bulge at the bend?

A. A bulge at the bend, yes, which tapers down to the case.

Q. Have you prepared just a rough pencil sketch of the cross-section of a seal of that type?

A. Yes. [76]

(Deposition of Hugh T. Stewart.)

Q. Would you mark on there where you are referring to this last bulge? A. This last——

Q. Wait until I give you a pencil. Does anybody have a blue or green pencil?

Mr. Klein: Yes. Blue, green, or red.

Q. (By Mr. Owen, Continued): You are marking with a blue pencil just what, Mr. Stewart?

A. I can probably illustrate on the drawing, if you want that.

Q. Go right ahead.

A. What my idea is regarding the force here.

Q. Yes. Go ahead.

A. One force is in that direction (indicating).

Q. Will you mark that arrow with an "A?"

A. Yes.

Q. What force is that?

A. That is the direct force of the spring.

Q. That is in the direction of the arrow "A?"

A. Yes. That would cause the lip to move in this way (indicating).

Q. You are now making a dotted line indicating a new position, a distorted position of the lip, is [77] that correct? A. That is right.

Q. Now, will you mark that line you have just drawn with the reference numeral "B?"

A. Yes.

Q. Explain just what you mean there by that distortion, and how it has happened.

A. Well, there is very likely a fulcrum at some point here in this rigid metal.

Q. Mark the fulcrum point "F," a large "F."

(Deposition of Hugh T. Stewart.)

A. And the rubber is flowing around that as a center and causing this bulging down here (indicating).

Q. Will you mark a "C" where that bulge is most pronounced? A. Yes.

Q. How far up does that bulge continue on the back face of the seal? Examine Exhibit 21 and tell, if you can.

A. That is a little bit—it is not a uniform bulge.

Q. Can you tell from examining Exhibit 21 why it is not a uniform bulge?

A. Well, this rubber material is cemented to the case so that prevents the metal in intimate—the rubber, [78] I should say, in intimate contact with the metal case from flowing, that adhesive bonding there, so the rubber is tending to flow up over that.

The largest volume of rubber seems to be through this point here (indicating) on this radius.

Q. You mean "C" on the sketch you have made?

A. That is right. That displacement there has taken place outwardly and sloping down to the plane of the case itself.

Q. How do you describe that? What is that due to?

A. It is due primarily to the force of the spring and the tendency of the spring to pull the sealing member inward and downward.

Q. How long would you say that that cold flow has been going on in that seal, Exhibit 21?

A. Well, I would not want to say.

Q. Has it stopped?

(Deposition of Hugh T. Stewart.)

A. Possibly ever since the pressure, the force, has been applied by the spring.

Q. Has it stopped, the cold flow?

A. I could not answer that.

Q. Now, will you look on the inside of Exhibit 21 and see if you find any other evidences of distortion [79] due to cold flow.

A. Well, comparing the shape of the *ceiling* lip with the shape of the mold and the shape of the drawing, Exhibit 314, which shows that it has a 20-degree angle, that is a straight angular surface there, whereas in the molded part it is radiused.

Q. Will you on that drawing, that sketch you just made, indicate the word "radius" where that radius thing is, and indicate that with your blue dotted line?

A. All right.

Q. You have accentuated it, have you, in your sketch?

A. Yes.

Q. Now, will you mark the word "radius" there?

A. Yes.

Q. What did you say that radius is due to?

A. I believe there was some wear or some sloughing at the point of contact with the moving shaft. Some of the rubber material has been abraded from it and reduced the thickness of that section, and by reducing the thickness of the section the effective force of the spring would be much greater to cause distortion.

Q. And that distortion is due to what? [80]

A. The force exerted by the spring.

Q. Now, will you look at the back radial face of

(Deposition of Hugh T. Stewart.)

the sealing element and see if you see there any evidence of distortion due to cold flow?

A. Yes. There are bumps and protrusions of varying heights and some depressions also.

Q. What are these depressions due to?

A. That is probably over one of those holes in the case.

Q. By looking at the inside of the seal opposite one of those depressions, do you get any clue as to what has taken place?

A. There is some distortion of the flange there. In fact, it has come away from the case.

Q. You mean, it has become uncemented?

A. Yes.

Q. What effect could that have on the back face that you say showed a little depression?

A. It is possible that the rubber pulling inwardly is tending to draw that rubber through the small anchor hole, or whatever it is called there.

Q. What is that change in shape due to?

A. Still the force exerted by the spring.

Q. Does Exhibit 21 show any signs of having been buffed after it came out of the mold, on the outer radial face?

A. Well, buffed or ground. There are still particles standing up that have been loosened from the main body by some means or other, either buffing or grinding. It exhibits a rough pitted surface.

Q. Having been in contact with it?

A. I beg your pardon?

(Deposition of Hugh T. Stewart.)

Q. Having been in contact with it?

A. With the grinding.

Q. With the grinding operation?

A. Yes.

Q. Is that correct? A. Yes.

Mr. Owen: This sketch that you have made, and upon which you have made various marks in connection with your testimony with respect to Exhibit 21, I offer in evidence as Plaintiff's Exhibit 25.

(The said document, so offered in evidence, was accordingly marked Plaintiff's Exhibit 25.)

[Plaintiff's Exhibit No. 25 appears in Book of Exhibits.]

Q. (By Mr. Owen): Now, will you take Exhibit 22, the seal that has not been tested, and see whether or not there you find any evidence of distortion, and if you do find it, point it out.

A. Well, the inside diameter of the sealing element has been reduced from that shown on Exhibit 314.

Q. That is, Exhibit 23?

A. Yes, but not to the extent that it has in Exhibit 21. It is entirely possible that the testing of that seal——

Q. You mean, Exhibit 21?

A. Exhibit 21—being in hot oil for thirty days was the reason for the apparent difference between 21 and 22.

Q. You mean, as far as distortion goes?

A. Yes. The acceleration due to heat. The oil

(Deposition of Hugh T. Stewart.)

might not affect it so much as the application of heat, and it being unsupported.

Exhibit 22 follows the same general line as Exhibit 21, except to not as great an extent in any case.

In this particular case the sealing surface shows a radius, too, but a radius that sweeps for practically the full length of that lip.

Mr. Owen: Does anybody have a green pencil that we can make another mark with?

Mr. Klein: Yes.

Q. (By Mr. Owen): Now, would you mark on Exhibit 25 what you say there about that radius extending the full length of the sealing lip, and mark it in green? A. All right.

Q. You are now drawing a green dotted line indicating a change in shape?

A. Yes. That is supposed to be the radius.

Q. Now, will you mark a legend on there in green with a dotted line to your dotted line saying "radius, Exhibit 22"? A. Yes.

Q. Now, what is that change in shape due to over the condition in which it came out of the mold?

A. That is caused by the spring, the force of the spring pulling inward.

Q. And what characteristic of the Thiokol material would have permitted that?

A. The tendency to flow under pressure, sustained pressure.

Q. Now, will you look at the outer radial face of that Exhibit 22 and state whether or not you find there any sign of distortion or change in shape over

(Deposition of Hugh T. Stewart.)

a shape which was flush or within the bottom of the case for the sealing element? A. Yes.

Q. What do you find there?

A. The same condition that exists in Exhibit 21. The material is flowing inwardly and out of the plane of the metal case.

Q. Would you complete that green dotted line that you started there, following the shape of Exhibit 22 as closely as you can? A. Yes.

Q. You are now making a dotted line out towards the bottom of the cup, is that correct?

A. Right.

Q. And that, you say, is due to the flow of the material into a new shape?

A. Due to the force of the spring, yes.

Q. Now, you did not actually measure the size of the shaft opening of that seal, Exhibit 22. Would you do that now, for the record?

A. It is irregular in shape. [86]

Q. You mean, it is not perfectly spherical?

A. It will have to be an approximation.

Q. All right.

A. It is 1.453 at one spot, 1.468 at another and 1.437 at still another point. You can get almost any dimension between those that I have given on it.

Q. What is that distortion due to?

A. The cold flow property of the material, due to the action of the spring force.

Q. Does that seal, Exhibit 22, show any sign of having been buffed on the outer radial face of the sealing element after it was taken out of the mold?

(Deposition of Hugh T. Stewart.)

A. Buffed or ground. The same condition exists here. There are minute pits and raised portions indicating that an abrasive material of some kind was at work on it.

There are lines on here, too, showing it has been ground.

Q. Do those same marks show, if at all, on the bottom of the case, too?

A. There are two marks on the bottom of the case. I would not want to say whether they were marks of the abrasive from the grinding, or marks from the tool that was used in making the case.

Q. Could they be either?

A. They could be either.

Q. Are there, Mr. Stewart, any recognized reference books in this art on synthetic materials?

A. Yes, there are.

Q. Rubber materials? A. Yes.

Q. Do any of them refer to this matter of cold flow and distortion?

A. Almost every independent reference to Thiokol in literature mentions the fact that one of its disadvantages is its tendency to cold flow.

Q. Does your own experience with Thiokol confirm what these different reference books have to say about cold flow? A. Yes.

Q. Do you have with you the Thiokol book put out by the Thiokol Company? A. Yes.

Q. Does that have anything to say about cold flow? A. Yes. [88]

Mr. George I. Haight: What is the date of this book?

(Deposition of Hugh T. Stewart.)

The Witness: I do not know, Mr. Haight. There is no date shown on it.

Q. (By Mr. Owen): When did you get possession of it, about?

A. Oh, I guess about 1937, or 1938.

Q. Did you ever talk with Dr. Patrick, the inventor of Thiokol, about this question of cold flow?

A. Yes. I talked with Dr. Patrick and Dr. Martin.

Q. Does what is in this book confirm what they told you and your own experience told you?

Mr. George I. Haight: You are getting into the field of hearsay. I object to it.

Q. (By Mr. Owen): Go ahead and answer. You can answer that question.

A. What was the question?

Mr. Owen: Read the question.

Q. (Read by the Reporter.) A. Yes.

Q. (By Mr. Owen): What do you find there in the 'Thiokol Instruction [89] Book on cold flow?

A. There is mention here—I might observe that all types of Thiokol with the exception of "RD," I believe it is, show cold flow tendencies.

I am now going to quote from the book here, page FA 4:

" 'Thiokol' type 'FA' stocks show remarkably fast and complete come-back from momentary distortion. However, when compressed for long periods of time, especially at elevated temperatures, they exhibit plastic flow. For many applications this can be corrected through design, or through compounding."

(Deposition of Hugh T. Stewart.)

That refers to Type "FA," Thiokol Type "FA" which is a modification of Thiokol "A."

On page FA 10 there is practically a duplication of that statement.

Q. What is the heading of that paragraph on FA 10?

A. "Stocks for Reduced Cold Flow."

Q. What does that say?

A. It says:

"While 'Thiokol' Type 'FA' stocks [90] show very fast come-back from momentary distortion, they tend to flow or take a high set (i. e. cold flow) when held under compression for long periods of time, at atmospheric temperatures. This condition is accentuated at elevated temperatures. Compound can be obtained that will not flow to an excessive amount when pressure is applied to them. The usual practice is to use as high a loading of the semi-reinforcing blacks as is consistent with the properties desired in the finished article."

Q. Now, did you bring with you any other reference books that have reference to this matter of cold flow in Thiokol?

A. Yes. Here is Harry Barron's Modern Synthetic Rubbers, published by D. Van Nostrand Company.

Q. What edition is that?

A. I think it is the Second Edition, 1943. On page 283 in the chapter on Thioplasts, the book states:

(Deposition of Hugh T. Stewart.)

“As already indicated the great snag which has checked the progress of this class of synthetic rubbers is the cold flow. Under [91] any degrees of temperature and pressure for any length of time these materials become distorted. Yet under conditions of instantaneous release they are quite as resilient as rubber. The cold flow is of considerable importance, since it means that the products cannot be used under conditions of tension or compression. It also necessitates the cooling of many types of moldings before extraction, so that there should be no permanent distortion.”

Q. What was the heading of that paragraph you just read?

A. “Thioplasts and Cold Flow.”

Q. Is Thiokol a Thioplast?

A. Yes. It is considered under that heading.

Q. Do you have any other recognized reference books that refer to this problem?

A. There is a book entitled “Plastics” by H. Ronald Fleck, published in 1945 by the Chemical Publishing Company, Inc., and on page 133 it states:

“Thiokols have one other outstanding disadvantage which limits their applicability—a tendency to cold flow. Under conditions [92] of instantaneous release they are as resilient as rubber, but when held for any length of time

(Deposition of Hugh T. Stewart.)

under pressure or load Thiokols become distorted and consequently cannot be used in positions where they would encounter prolonged tension or compression.”

Q. Are you familiar with the tests of the American Society for Testing Materials in connection with rubber materials? A. Yes.

Q. Do they have any recognized test for determining the presence of cold flow in such materials?

A. They call it “set.” There are two methods of determining it. There is the constant deflection method and the constant load method.

Q. What is the constant load method?

A. That is where a specimen of rubber is held under compression by a spring at a constant load for a certain length of time.

To accelerate it, the speed of action, it is usually put in an oven and after a certain elapsed time, whatever the test procedure calls for, it is taken out and the recovery is measured. [93]

Q. Is there any similarity between this test and the condition in which exhibits 21 and 22 have been in the past eleven years?

A. Yes. You have in both of these Exhibits the force applied by the spring, a definite force applied by a spring.

Q. In your opinion is the present shape of Exhibits 21 and 22 due to the cold flow? A. Yes.

Mr. Owen: That is all.

(Deposition of Hugh T. Stewart.)

Cross-Examination

By Mr. George I. Haight:

Q. When were you employed by the Bell Telephone Laboratories? A. From 1922 to 1925.

Q. Was that in New York City?

A. 463 West Street, New York City. At that time the company was known as the Research Department of the Western Electric Company. Bell Telephone Laboratories was a name given later to the organization.

Q. Was Dr. Jewett head of the laboratory at that time? A. Yes. [94]

Q. What work did you do there?

A. I worked with Mr. A. R. Kemp.

Q. What did you work on? A. Rubber.

Q. What were you trying to determine in connection with rubber?

A. They had many problems. They were trying to build electrical characteristics into rubber, flex resistance, compounds to prevent the effect of perspiration on hard rubber telephone receivers and so forth.

Q. That was in connection with materials in the telephone industry being manufactured by Western Electric Company here in Chicago.

A. Yes.

Q. Did you work in any other field while you were with the Bell Telephone Laboratories?

A. I did a little work on paper and insulation, more in comparison to rubber than for any other reason.

(Deposition of Hugh T. Stewart.)

Q. When did you first become acquainted with the use of Thiokol "A" as a sealing element in an oil seal? A. I would say about two weeks ago.

Q. You had never known of Thiokol being used as a sealing element in an oil seal prior to that time?

A. No, sir.

Q. When did you first see Plaintiff's Exhibit 21?

A. That was about two weeks ago in the Court House in San Francisco.

Q. When did you first see the oil seal, Plaintiff's Exhibit 22?

A. At the same time.

Q. When did you enter the employ of the Plaintiff Company?

A. Early October a year ago. It was 1944.

Q. Were you familiar with the hearing in this lawsuit that was had in San Francisco in January of this year? A. No.

Q. You knew nothing about it?

A. No, sir.

Q. When you saw Plaintiff's Exhibits 21 and 22 had you ever been told anything about them prior to that time? A. No. [96]

Q. How did you happen to go there?

A. Mr. Owen called me, at San Francisco.

Q. Did you have any discussion with Mr. Owen about it before you saw the seals?

A. No. I met him in the Court House.

Q. Did you make an examination of them at that time, at the Court House?

A. A casual examination, yes.

(Deposition of Hugh T. Stewart.)

Q. Did you later make a more thorough examination?

A. I looked at them more thoroughly last evening.

Q. Here in Chicago? A. Yes, sir.

Q. Did you make any measurements when you first saw them? A. No.

Q. Did you make any measurements when you saw them here yesterday?

A. Just rough measurements.

Q. Thiokol "A" has always had cold flow, as I understand it, has it not?

A. Yes, it has.

Q. And you knew that from the very beginning?

A. Yes, sir. [97]

Q. You knew that when you first contacted Dr. Patrick? A. No, I did not.

Q. What uses have you put Thiokol "A" to, if any?

A. Well, I found that the best use for it was as a coating on cloth, where cloth would support it and keep it from spreading around.

Q. Any other uses, within your experience?

A. None that have any satisfactory commercial application along the lines I am familiar with, the packing industry.

Q. Are you acquainted with the material known as Duprene? A. Yes.

Q. When did you first become acquainted with that? A. About 1932, I believe.

(Deposition of Hugh T. Stewart.)

Q. What was the occasion of your becoming acquainted with Duprene?

A. Well, in my own business at that time I was interested in all of the new polymers that were being brought out as a binder for powdered metal and asbestos fibres in the material I was making personally [98] at that time, and I had materials submitted to me of all kinds of which I made cements in order to incorporate these other things into it.

Q. Do you know anything about the characteristics of Duprene in respect to cold flow?

A. Some of the Neoprene materials have more of a tendency along that line than others.

The first Neoprene we worked with when it was called Duprene, I believe was Type E, and that did not have a great deal of tendency to cold flow, as I recall it. It did have a tendency to stick to any metal it was in contact with under pressure, and that limited its application.

Q. In view of your acquaintance with such materials, will you look at the drawings of the mold from which the seals, Plaintiff's Exhibits 21 and 22 were made, which are Plaintiff's Exhibit 23, the mold bottom Exhibit 316, and the mold top Exhibit 315.

A. Yes.

Q. In using that mold and making seals like Plaintiff's Exhibits 21 and 22, would there be any shrinkage of the Thiokol material upon its removal from the mold?

(Deposition of Hugh T. Stewart.)

A. There might be a very slight shrinkage. As I understand it—can I qualify this a little bit?

Q. Oh, certainly.

A. These particular seals were molded from Thiokol "A" which had been reacted previously with zinc oxide and then ground and formed into a powder and reformed under heat and pressure.

Any pressure—or rather, any shrinkage that would take place would take place in the original reaction.

There might be a slight shrinkage take place at the temperature coming out of the mold, but it might be only a matter of a thousandth or two in the diameter.

Q. Let us assume that the heat applied to the material in the mold goes up to 250 to 300 degrees Fahrenheit. On cooling of the material or the seal, the oil seal, when removed from the mold would you expect considerable shrinkage?

A. I do not believe I understand your question.

Mr. George I. Haight: I will try to make it clear.

Q. (By Mr. George I. Haight): I am going through, now, the process of manufacturing oil seals, Plaintiff's Exhibits 21 [100] and 22. I am assuming that they are put in the molds we just identified, that they are brought to a temperature for about four minutes of from 250 to 300 degrees; that then they are cooled somewhat and then they are removed.

(Deposition of Hugh T. Stewart.)

Upon that cooling would there be any shrinkage in the seal, which would be made of Thiokol "A"?

A. Made of Thiokol "A," there probably would be, but made from Thiokol "A" mold powder, I doubt that there would be any appreciable shrinkage.

Q. Why the difference?

A. Well, in straight Thiokol "A" which was compounded in the usual manner, you have got to cool that before you remove it from the mold because it is a gassy material and if you opened the mold while the stock was still hot, it would blow and distort, blow itself out of shape.

On the other hand, you can take Thiokol "A" after it has been reacted with zinc oxide and grind it up into granular form, put that back into a mold and reform it again, and no further gassing takes place, so you can remove Thiokol mold powder from a hot mold and not distort it unless [101] you stretch it out of shape deliberately.

Q. Let us assume that when such a seal as Plaintiff's Exhibit 21 or Plaintiff's Exhibit 22 is removed from the mold, you put no spring on it.

What, if anything, will happen to Thiokol "A" material? No pressure applied to it at all.

A. Depending upon the original compounding, it might over a period of time gradually fall of its own weight in the unsupported part of it.

Q. Fall away from the metal?

A. Fall away from the metal, yes.

Q. That is, it would contract?

(Deposition of Hugh T. Stewart.)

A. Well, as I say, it depends upon the compounding. If there were some volatile materials there, some vagrant materials that came off after a period of time, you would have contraction. In order to contract, something has to leave.

Q. Would you call that contraction cold flow?

A. I would want to know more about it before I made a statement.

Q. Will Thiokol "A" cold flow without the application of pressure to it?

A. I do not recall in my experience ever seeing that it did. The reference book here states that it will.

Q. You have been relying on those reference books since you presented them in your testimony, have you not? A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And based upon that it would cold flow and change in its dimensions without the application of any spring pressure, would it not? A. Yes.

Q. In that change would it shrink or expand?

A. You mean, volumetrically, or diametrically?

Q. Any way.

A. I cannot see how it would expand any. If anything, it would shrink.

Q. Then when a spring is applied, it does not shrink: it expands, is that right?

A. It contracts.

Q. Does it contract without the pressure of the spring and also contract with the pressure of the spring?

(Deposition of Hugh T. Stewart.)

A. My opinion is that the spring accelerates the contraction.

Q. Then any cold flow caused in Plaintiff's Exhibits 21 and 22 due to the presence of a spring would effect a contraction of the Thiokol in the material and not an extension, is that right?

A. In dimension.

Q. In dimension? A. Yes.

Q. And in all dimensions?

A. At the point where the spring is the motivating force. Now, if that Thiokol was trying to flow away from the force of that spring, it might move outwardly, not inwardly, at some other point.

Q. But the general result would be a shrinking of the Thiokol material, would it not?

A. Well, I think we are thinking of the term "shrinkage" in two different ways.

I regard shrinkage as a reduction in volume.

Q. That is what I am doing.

A. I know now what you mean. I do not think it would reduce in volume at all, unless something left it, unless there was an evaporation or something [104] there.

Q. That is, you do not think it would compress any more?

A. Well, if you compress it at one point, it has to move out at some other point.

Q. But you said without the application of any spring pressure whatever, it would shrink. That is what you said just a few minutes ago. That is right, is it not? A. Shrink or contract.

(Deposition of Hugh T. Stewart.)

Q. And if it shrinks there will be a change in volume, will there not?

A. Yes. I misunderstood, I think, what—

Q. And that volume would be smaller?

A. No. It would not be, no. I was not speaking of any volumetric change at any time. If I used the word “shrinkage” it was unfortunate.

Q. I understood you to say a while ago that you did not understand in what sense I was using it, and that you were using it in the sense of a change of volume.

A. I said I regard the use of the word “shrinkage” as a change in volume. That is my conception of the word. [105]

Q. And when you were talking about it shrinking, you meant a change in volume?

A. No. I meant a change in dimension.

Q. That is, it has the same volume, but a different shape?

A. Yes.

Q. Is that what you mean?

A. That is right.

Q. Then without the application of any spring—let us get your testimony straight—due to cold flow there would be a change of shape but no change in volume; is that what you now say?

A. Right. Yes, sir.

Q. What shape, in your opinion, would this sealing element assume just through cold flow with the application of no spring?

A. I would not express an opinion, because I do not know.

(Deposition of Hugh T. Stewart.)

Q. Have you ever made any tests to determine how it would still keep the same volume but change in shape without the application of any pressure?

A. You mean, just standing at atmospheric temperature and pressure?

Q. That is right. [106]

A. Well, any unsupported section might collapse slightly.

Q. Just of its own weight?

A. Just of its own weight, just like a candle will do on a warm day.

Q. You know something about oil seals now, do you not?

A. I do not know how much.

Q. Based on what you know, whatever it is, would you consider a material that operates like that operable at all in an oil seal? A. No.

Q. Now, as I understood your direct testimony there were two elements that had to do with this cold flow.

One was the inherent characteristic of Thiokol "A" itself. Another element is spring pressure. Did I get you correctly? A. Yes.

Q. Now, the amount of that spring pressure would be a factor in respect to cold flow, would it not? A. Yes, sir.

Q. Have you examined the springs on Plaintiff's [107] Exhibits 21 and 22 respectively to see if the springs are the same springs?

A. No, I have not.

Q. If you found the spring in Exhibit 21 shorter

(Deposition of Hugh T. Stewart.)

as to its wire length than the spring in Exhibit 22, would you not think that that would account for the greater distortion in Plaintiff's Exhibit 21 than in Plaintiff's Exhibit 22?

A. I am not qualified to answer that.

Mr. George I. Haight: Then I will put it to you this way:

Q. (By Mr. George I. Haight): If you will assume that the spring in Exhibit 21 exerted a greater pressure upon the sealing material than did the spring in Exhibit 22, in your opinion would the distortion of the sealing element be greater or lessor in seal 21 as compared with seal 22?

A. I would say the distortion would be greater.

Q. And if it should be found that the spring in 21 were shorter than the spring in 22, would that account for the difference of greater distortion in 21 over that of 22, in your opinion?

A. Yes, sir.

Q. Now, if we start with a device such as would be made by the mold depicted here in Plaintiff's Exhibit 23, Exhibits 316 and 315, we would have an oil seal in which the radial face of the sealing element would be in a line with the metallic cup bottom, would we not? A. Yes.

Q. And if you say there would be no change in dimensions when we removed it from the mold, the completed article would be the same article that would be represented by the hollow of the mold, would it not?

A. The cavity of the mold, yes.

(Deposition of Hugh T. Stewart.)

Q. Now, if you put on spring pressure, through a garter spring mounted as shown in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22, that, as I understood your testimony, would extend the face out further; that is right, is it not? A. Yes.

Q. Another factor that would enter into that would be heat, would it not? A. Oh, indeed.

Q. Now, assuming that Plaintiff's Exhibit 21 was tested for a period of thirty days running upon a shaft and that the oil heat was, let us assume, around 190 or 200 degrees Fahrenheit, what effect in your opinion would that have upon the Thiokol material, the Thiokol "A" material of that sealing element?

A. Well, the fact that it was in a testing unit with a shaft running in there, probably prevented the distortion that would take place if you had immersed the seal in hot oil for thirty days with no support. It might have collapsed completely in that length of time.

Q. Would the pressure of the spring while the seal is mounted on the shaft in Plaintiff's Exhibit 21 cause this cold flow you are talking about while it was in operation in the test for thirty days?

A. I think it would.

Q. That would be due to the pressure of the spring and due to the condition of the Thiokol "A" material as effected by the heat, is that right?

A. Right.

Q. So we would have, at the end of that test, a seal in which the shape of the Thiokol "A" ele-

(Deposition of Hugh T. Stewart.)

ment was changed, would we not, at the end of such a test?

A. I feel that you would, yes. [110]

Q. Would the spring during the time of the test tend to move the Thiokol "A" sealing element about the fulcrum that you mentioned in your testimony?

A. May I have that question read?

Mr. George I. Haight: Read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. No. I am inclined to think that the movement in that direction would not be very great.

Q. (By Mr. George I. Haight): Why not?

A. I do think that the movement would be—if the lip would be extended out along the shaft, I think the movement would be in that direction.

There might be some tendency for it to move down in this direction, but I think the greater tendency would be to flow down that way. (Indicating)

Q. Will you look at Plaintiff's Exhibit 21 and tell us how much, in your opinion, the lip has moved down the shaft line?

A. Well, the spring has pulled it into the point where you cannot tell how much of that was [111] extended in this direction (indicating). It has now been pulled in toward the center.

Q. Will you look at Plaintiff's Exhibit 22, the other seal said not to have been tested, and see if there is any difference in that respect between Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22.

(Deposition of Hugh T. Stewart.)

A. Yes. There is considerable difference in the length of the sealing lip.

It is variable, the lip in Exhibit 21 is longer than the one in Exhibit 22.

Q. Will you put this upon a stub shaft, which I think you will find will fit.

The shaft, you^r can assume, is of a diameter of one and nine-sixteenths inches.

A. Shall I take this wire off?

Q. Yes. Let the record show the witness is taking a wire that attaches the tag to the Exhibit off, and will replace it.

A. Oh! I broke it.

Q. You broke what?

A. The element split all the way around.

Q. What caused that?

A. Forcing it over this plug. [112]

Q. What does that indicate to you about the condition of the Thiokol "A" material?

A. Poor tear resistance, for one thing. Some embrittlement, probably.

Q. What is that?

A. Some embrittlement, and poor tear resistance.

Q. How about the bonding and fastening of the material to the cup, at the inwardly extending flange?

A. The adhesive bonding?

Q. Yes.

A. It seems to be loosened slightly along the edge here. Whether the bond is loosened any in the unexposed parts, I do not know.

(Deposition of Hugh T. Stewart.)

Q. And if the bond is gone, the whole sealing element collapses, does it not?

You have no fulcrum?

A. If the bond is completely gone, yes.

Q. Then there would be no fulcrum, would there? A. No.

Q. Now, I will not have you do that with Plaintiff's Exhibit 22, because we might affect that exhibit also, so we will leave that alone.

A. All right. [113]

Q. Would an oil temperature of 195 to 200 degrees Fahrenheit during a 30-day test such as you have here described on the seal, Plaintiff's Exhibit 21, soften the Thiokol sealing element?

A. Yes, it would soften it.

Q. It would soften it to such an extent that it would cause the spring to imbed in the Thiokol material?

A. I think the effect would be more from the temperature than from the oil.

Q. And what would be its effect, if any, on causing the spring to imbed?

A. Well, it would leave the impression of the spring in the rubber.

Q. Do you find that in Exhibit 21?

A. Definitely.

Q. Now, you say that in Exhibit 21 the lip of the sealing element was extended. A. Yes.

Q. What in your opinion caused that?

A. The tendency of the Thokol to flow away from the force that was being exerted on it plus

(Deposition of Hugh T. Stewart.)

the wiping action of the shaft itself that was running.

Q. And after that action was done and the [114] test completed, would you expect that deformation to still continue, or is there any stopping point?

A. I never tried to find out.

Q. Well, what is your opinion?

A. I have not any.

Q. Do you think it goes on for years and years and years? A. I could not say.

Q. You do not have an idea that this tendency to cold flow has solved the perpetual motion problem? A. No, I do not.

Q. Would it cold flow at all after the test when it was removed from the shaft?

A. Yes, I think it would.

Q. Would the lip still continue to extend due to cold flow?

A. You mean, along the shaft? In that direction?

Q. Yes, along the shaft.

A. It is possible.

Q. In your opinion it would so continue to extend?

A. Are you speaking now of having a shaft in there at this particular time?

Q. No. You have had it on the shaft for thirty days, and now you have taken it off.

A. Taken it off?

Q. Yes.

(Deposition of Hugh T. Stewart.)

A. What you mean is, it will move in that direction (indicating)?

Q. That is, move in a direction which, if it were on the shaft, would be longitudinal of the shaft.

A. I see what you mean. No, I do not think it would.

Q. It would stop, would it not?

A. It would stop.

Q. Why?

A. Because the shaft was giving it support. The tendency of the spring was to pull this inwardly, but the shaft would not permit it, so it followed longitudinally of the shaft.

Q. If it would stop in that direction, why would it not stop in the other direction?

A. What do you mean?

Q. If this cold flow would stop in one direction, if it would stop longitudinally, why would it not stop in the other direction?

A. We are talking about directions. Which direction do you mean?

Q. We have just been talking about the direction away from the edge of the lip when it was first mounted, and you said that lip started to grow down the shaft. A. That is right.

Q. Now, I am asking you: If that stopped, as you say, after it was removed from the shaft, why would it not stop, the cold flow, in the other direction?

You understand that, do you not?

A. Yes.

Q. Well, answer it then.

(Deposition of Hugh T. Stewart.)

A. There is not any answer to that one.

Q. Why not?

A. Because a different set of forces are in existence at that time. As soon as that shaft is removed, different conditions exist.

Q. Then you say it would move in the other direction, do you?

A. Well, what are the conditions we are talking about? That is what I want to know. [117]

Q. I am talking about the conditions that you had in mind when you gave your direct testimony, so keep those same conditions in mind.

A. I was not talking at that time about having any shaft in here at all. I am not familiar with the application of the seal, the testing, or anything of that kind. I was merely asked to give my opinion of what happened by just looking at these things.

Q. When the seal was removed from the shaft after this thirty day test, was the pressure of the spring upon the sealing element the same as it was when it was on the shaft?

A. No, because the sealing element was no doubt extended over the shaft and the spring pressure would be greater due to increased tension.

Q. And the spring under the heat would imbed in the sealing element, would it not?

A. It shows signs of having done so.

Q. Then it is your idea that the spring will keep right on pressing, is that right?

A. Yes.

(Deposition of Hugh T. Stewart.)

Q. And there is no end to it, is that right?

A. I would not say that. [118]

Q. Is that still expanding or changing shape right now as it lies before you, eleven years afterwards?

A. I could not say as to that.

Q. You do not know?

A. No. I would be inclined to think, though, that as long as there was any tension in the spring, as long as there was no expansion there, there would be pressure until the spring tension was relieved.

Q. Since there is a stoppage of the movement of the lip down the shaft, but it continues in the part of the sealing element to the other side—do you understand me?

A. Yes.

Q. (Continuing): —which, you say, is due to different forces, what are those forces?

A. Well, with the removal of the shaft, the tendency to pull inward is accentuated.

The rubber stock no longer has a shaft to line up against and support it, so when it is removed there is nothing to help keep it from collapsing inwardly.

Q. And there being nothing to prevent it, it does collapse inwardly? [119]

A. Definitely.

Q. And your spring pressure is gone, is it not, if it collapses inwardly?

A. If it collapses as far as it wants to go, yes, if the tension is relieved.

Q. That is what would happen, is it not?

A. Yes.

(Deposition of Hugh T. Stewart.)

Q. So that collapse would occur almost at once, would it not, on removal from the shaft?

A. Not at atmospheric temperautre and pressure, I do not think.

Q. Well, would it take two days or ten days?

A. I would not know.

Q. Would it take three years?

A. I am not qualified to say. I could not estimate at all.

Q. Now, don't you know that whatever would happen in that regard would happen almost at once? It must, must it not?

A. No. I do not agree with that.

Q. If there is a change in the dimension of the sealing element during the test period of thirty days and later you found some more change, how much of the change would be due to the test and how much of the [120] change would be outside of the effects, the direct effects of the test?

A. There is no way to determine that, unless you have observed it at the time.

Q. And it would be just as good an opinion, in your judgment, that the change occurred in the main during the test, as it would that some change occurred after the test, would it not?

Have you an opinion on that either way?

A. Well, comparing the two, I have.

Q. Comparing the two what?

A. The two exhibits here, the one that has been tested and the one that has not.

(Deposition of Hugh T. Stewart.)

Q. The one that has been tested has a somewhat greater change? A. Oh, indeed.

Q. Due to the fact that it was tested?

A. That is right.

Q. And if the other one had been tested in the same way, you would expect the same changes, would you not?

A. Changes along the same line, yes, sir.

Q. But in Plaintiff's Exhibit 22 the spring [121] is not imbedded in the sealing element to the extent it is in 21, is it?

A. It is imbedded in 22 to some extent, but not to the extent it is in 21.

Q. That is, the pressure exerted by the spring on the sealing element in 21 is much less than the pressure exerted by the spring in Plaintiff's Exhibit 22, is that right?

A. Not being familiar with the spring, the physical characteristics of it, I would not know how to answer that.

Q. I will ask you to assume that the spring in Exhibit 21 has 211 coils and that the spring in Exhibit 22 has 227 coils; and I will ask you to assume that the diameter of the wire is the same, .025.

Which spring will exert the greater pressure, the shorter or the longer one?

A. The shorter one.

Q. And when we get through with the test of Exhibit 21 and remove it from the shaft, we have

(Deposition of Hugh T. Stewart.)

a collapse of the material, the spring has been imbedded, and that work is over.

That is right, is it not? [122]

A. I did not quite get that.

Mr. George I. Haight: All right. You did not get it.

Q. (By Mr. George I. Haight): Now, in respect to Exhibit 22, which is the longer spring, we will assume—I just ask you to assume that.

A. Yes.

Q. That was not tested. In your opinion, would that exert a greater pressure upon the untested 22 than the pressure on the tested 21 after it was tested?

A. It would exert less pressure. The spring is more relaxed.

Q. But in 21 the spring is imbedded in the Thiokol material, is it not?

A. Slightly, yes.

Q. And not so much, I think you said, in that Exhibit 22? A. That is right.

Q. Did you take that difference into account also?

A. It has some bearing on it. There is no question about that. [123]

Q. Now since, in your opinion, Thiokol material was bound to cold flow, if you start with a material that is even, the same radial plane as the bottom of the metal cup, you expect that to come out more, do you not?

You expect it to get further away from the cup

(Deposition of Hugh T. Stewart.)

on the radial plane of the Thiokol material, do you not? A. When?

Q. Any time.

A. I am sorry. I do not understand the question. Is that during the molding?

Q. After the device has been made.

A. Yes.

Q. After the device has been made. We will start first with 21.

Now, during the test of 21 there was a change in the material due to the circumstances of the test, which included the action of the spring, the action of the shaft, the action of heat and all of the other elements, if any others, that entered into that test. During that time the Thiokol material's lip extended. That is what you said. A. Yes. [124]

Q. But you do not expect that to keep on growing after the test was over and the spring pressure was removed and the Thiokol material collapsed. That is right, is it not? A. Yes.

Q. But you do expect some movement notwithstanding that condition, with your spring pressure gone, in the rest of the sealing element, do you not?

A. Are you assuming that when the test was completed and this snapped in, there was no more tension of the spring?

Q. I am just taking your testimony, sir. I am assuming nothing. You have come here as an expert upon this, I assume, and I am taking your words, so I will ask you again:

In Plaintiff's Exhibit 21, in respect to that part of the sealing element that you say had a move-

(Deposition of Hugh T. Stewart.)

ment around the fulcrum, we are now clear that your proposition is that in respect to the part on one side of the spring that movement is stopped, but it has not stopped in respect to the part of the sealing element on the other side of the spring.

Let us just stay to something.

A. I did not say that the movement had stopped. When the shaft was removed from there, that thing snapped inwardly.

Q. Yes.

A. If there was still tensional force in that spring, it would continue to push it in and distort that material. That is the point I made.

Q. But that is not true of the lip, is it?

A. I do not know anything about the lip.

Q. Well, you told us very definitely about it a while ago. Do you want to change your testimony?

A. No. I do not want to change my testimony.

Q. Well, leaving the lip out, leaving the lip out then for the moment, let us take the rest of the sealing element, but let us exclude the lip.

That had its growth during the test.

A. That is right.

Q. Now, you said that it started to move around the fulcrum, did you not? A. Yes.

Q. That is right, is it not? A. Yes.

Q. O. K. Was that due to spring pressure?

A. Is was due to cold flow.

Q. What was the cold flow due to? [126]

A. I am assuming it was from the spring pressure.

Q. Now, did any other factor, any other energy

(Deposition of Hugh T. Stewart.)

enter into that cold flow, to cause it, except the spring pressure?

A. None that I know of.

Q. And whatever that spring pressure would do would be done within a year or two, would it not?

A. I could not answer that because I do not know.

Q. Would it keep on going for three years?

A. I would not know.

Q. Would you say that it was not all over within a week after the test on Exhibit 21 was completed?

A. If it was preserved at atmospheric temperature and pressure, I do not think it would be.

If it was put in a warm place, it might happen in a day's time.

Q. If it was put in an ordinary safe it would remain just the same unless there was a fire, or something of that sort; that is right, is it not?

A. Yes.

Q. Even if it were Mr. Johnson's safe that would still be true, would it not? [127]

A. I think so.

Mr. George I. Haight: All right. I did not know but what he had a hot safe. Now, Mr. Owen, it is quarter of one. Off the record.

(Discussion off the record.)

(And Thereupon, the further taking of the above-entitled depositions was recessed until 2:00 o'clock p.m.)

Friday, June 7, 1946, 2:00 o'Clock p.m.

HUGH T. STEWART

Cross-Examination

(Continued)

By Mr. Haight:

Q. Will you look at Plaintiff's Exhibit 25 which was offered on the record this morning.

A. Yes.

Q. You have indicated there an arrow at "A." What is that supposed to represent?

A. The line of force exerted by the spring in that direction.

Q. Does that line of force have any effect upon that part of the seal that is immediately to the left of the arrow and above the part that you have marked at the end "F"?

A. I feel that the action of the spring tends to place this section indicated by the letter "A" under compression, and this portion immediately over the end of the metallic insert, if we can call it that, under tension.

Q. So that one part of the sealing element is being compressed and the other is under tension, is that right? A. Yes.

Q. What, in your opinion occurs to the part that is under tension?

A. You probably get a reduction of area at that point. It gradually thins out there, would be my opinion.

Q. Where it is compressed, what occurs?

A. A thickening.

Q. Now, is there any other force, in your opin-

(Deposition of Hugh T. Stewart.)

ion, operating to change the sealing element in any regard other than the pressure of the spring?

A. No. I would not say that there was.

Q. So that if there were no spring there, nothing would happen?

A. Other than the slight tendency to fall inward, due to the weight of this unsupported section here (indicating). It might or might not take place over a long period of time. That would be the natural cold flow.

Q. Have you any idea how much that weight is?

A. No, I have not.

Q. It is a very small weight indeed, is it not?

A. Very small weight, yes.

Q. Do you think it is over an ounce?

A. No. It is not an ounce.

Q. It is less than an ounce? [131] A. Yes.

Mr. Owen: For what area?

The Witness: I assume Mr. Haight means this part that is unsupported here.

Q. (By Mr. Haight): All right.

A. It would be very much less than an ounce.

Q. A thousandth of an ounce?

A. Well, I would roughly assume that the weight of the rubber in there, in a seal of that size—we could probably get 90 of them to the pound, not considering the weight of the case, and if we could roughly assume that half of it would be the weight of the unsupported section, it would be about 1/180ths of a pound.

That is just a pure assumption on my part.

(Deposition of Hugh T. Stewart.)

Q. Now, you have a green line. What does that indicate, upon Plaintiff's Exhibit 25?

A. That is the radius that appears on Exhibit 22, the seal that was not tested.

Q. Now, taking the figure that you have represented there on Plaintiff's Exhibit 25, where you show what you say is the direction of movement, would there be some movement on the first day after the spring was put on?

A. I think there would be some movement almost immediately after the spring was put on.

Q. And also as that movement occurred would there be a little less pressure by the spring?

A. Yes.

Q. And on the second day would there be a little more movement? A. That is right.

Q. And still a little less pressure on the spring.

A. Yes.

Q. Is that correct? A. That is right.

Q. At the end of ten days the spring pressure would be decreasing each day and a little movement would be occurring each day, is that right?

A. Yes.

Q. Have you any opinion as to when this spring would not compress any more?

A. I imagine when the point was reached where the spring was at rest.

Q. When, in your opinion, would that be reached? [133] In the matter of a week?

A. I have not any opinion on that.

(Deposition of Hugh T. Stewart.)

Q. You would not know whether it would be a week or a year? A. No, I would not.

Mr. George I. Haight: All right.

Q. (By Mr. George I. Haight): Did you hear the testimony about the use of plibond cement this morning? A. Yes.

Q. Are you familiar with that?

A. Yes, I am.

Q. When did you first become familiar with that? A. Not over three years ago.

Q. It was not on the market until 1940, was it?

A. I do not believe that it was, no. It is a Goodyear product.

Q. What is the nature of that, if you know?

A. It has never been disclosed, but I have formed an opinion as to what some of the things are that are in there.

There is phenolic resin, for one thing. There is vinylite resin. I believe there is [134] also butadine, a butadine polymer.

Q. The same combination that the manufacturers of shoes use for their cement, is that not correct?

A. Yes. I think so. There are a number of them on the market.

Q. Now, will you look again at Plaintiff's Exhibit 22. A. Yes.

Q. Let us look at the radial face of this sealing member, at the top. Do you notice any movement that has seemingly occurred around the edges of that material anywhere?

(Deposition of Hugh T. Stewart.)

A. There is some brown material there. That, I assume, is the cement that was used, and that is exposed. Q. Yes.

A. Whether that has been exposed by grinding or whether it was exposed by movement of the rubber itself away from the cement, I cannot tell.

Q. There is not any way you can tell whether there has been any movement there or not, is there?

A. No. I cannot tell.

Q. How about the middle of that same area, toward the hole in the center? [135]

Do you observe anything that indicates there has been any movement of that?

A. No. I do not see any indication.

Q. That is true across that entire face, is it not?

A. There is some—there are some blemishes on there. It is difficult to say just what they are.

Q. It might be due to bad bond, might it not, or the lack of it?

A. I am sure I would not know.

Q. You testified on your direct examination that this material tends to flow under sustained pressure.

When the pressure is no longer sustained there is no more flow. That is right, is it not?

A. Yes.

Q. Did you ever successfully bond Thiokol "A" to metal?

A. I do not recall that I ever tried to.

Q. Can you find me, conveniently, that part of the Barron book that you referred to?

A. Yes.

(Deposition of Hugh T. Stewart.)

Q. Now, I will quote a sentence from the part which I understood you read, speaking of Thioplasts and cold flow:

“Under any degrees of temperature and pressure for any length of time these materials become distorted.”

You agree to that, do you? A. Yes, sir.

Q. That has always been true of Thiokol “A,” has it not?

A. All that I have ever known about.

Q. You said in your direct examination something with regard to the tolerances that you noticed upon Plaintiff’s Exhibit 23, and particularly Exhibit 314 thereof. What is the range of tolerances there?

A. On the inside diameter it runs from 1.511 inches to 1.521 inches.

Q. And you think those are perfectly fair tolerances to allow?

A. In the light of present day practices, I do not.

Q. What tolerances would you allow in the light of present day practices?

A. We maintain our tolerances at five thousandths of an inch; two and one-half thousands each way. [137]

Q. In view of this cold flow you have been talking about, as you have illustrated it in Plaintiff’s Exhibit 25, that material could not possibly stay within those tolerances could it? A. No.

Q. In other words, with that material you could not make and have for more than a few minutes

(Deposition of Hugh T. Stewart.)

after you put the spring on, the structure with the tolerances that is illustrated in the drawing to which I have just referred, could you? A. No.

Q. What? A. No.

Q. You read from another book—I have forgotten which one—but the note that I got indicates that it said something about cold flow being a great snag in materials of that kind.

Is that the same book?

A. I think that is Fleck's.

Q. Fleck's? A. Yes.

Q. Will you find that one, please, if you can conveniently?

A. Yes. It is right at the top of the page there.

Mr. George I. Haight: Thank you. This is the Fleck book on plastics, published in 1945, to which the witness referred on his direct examination.

Q. (By Mr. George I. Haight): This says:

“Thiokols have one other outstanding disadvantage which limits their applicability—a tendency to cold flow. Under conditions of instantaneous release they are as resilient as rubber, but when held for any length of time under pressure or load Thiokols become distorted and consequently cannot be used in positions where they would encounter prolonged tension or compression.”

That quite rules them out for oil seals, does it not? A. Indeed it does.

Q. And this is speaking of Thiokols way up in 1945, is it not? A. Yes.

(Deposition of Hugh T. Stewart.)

Q. And the Thiokol "A" of 1935 was much worse, was it not?

A. They have learned a great deal about them since. [139]

Q. Yes, but it was much worse?

A. Oh, yes.

Q. You said something about tests of the American Society of Engineers—was that the organization?

A. The American Society for Testing Materials.

Q. The American Society of Testing Materials?

A. The American Society for Testing Materials.

Q. You said somebody called something "set." What was that?

A. Well, what we are talking about as being distortion, in the American Society for Testing Materials' book of Standard Methods of Testing, they call that "set" in a rubber compound.

Q. By that they mean permanent set, do they not?

A. Yes. That is true.

Mr. George I. Haight: Off the record.

(Discussion off the record.)

Mr. George I. Haight: That is the end of the cross-examination.

Redirect Examination

By Mr. Owen:

Q. Mr. Stewart, during your cross-examination you were handed a stub shaft and asked to shove Exhibit 21 onto that shaft. [140]

(Deposition of Hugh T. Stewart.)

Will you describe what happened when you did that?

A. The sealing element split. I should have had more respect for its age.

Q. What do you mean by "age"? What does that have to do with it?

A. Well, any stock that is lying around for eleven years would not have very much life in it, and I stretched it beyond its elastic limit.

Q. During your cross-examination about this Exhibit 21, your attention was called to the fact that in some of the places the sealing element has pulled loose from its bond with the case, and I believe Mr. Haight asked if that did not mean that the fulcruming point "F" in Exhibit 25 would have been destroyed. I think you answered "Yes" to that question.

That is right, is it not? A. Yes.

Q. What takes place when that fulcruming point is destroyed so far as cold flow and distortion are concerned, and if you can illustrate it by Exhibit 21, please do so.

A. Well, the same thing would happen as if the metal insert was not present. It would just fall away gradually without any stopping effect from the presence of the metal insert.

Q. What effect would that have on the sealing face, the sealing material in Exhibit 25 just to the left of the perforation or anchoring hole?

A. I do not think I understand that Mr. Owen. Mr. Owen: Read the question.

Q. (Read by the Reporter.)

(Deposition of Hugh T. Stewart.)

Q. (By Mr. Owen): In answering the question you can look at Exhibit 21 and see what the effect has been.

A. It seems to be pulling away here, pulling inwardly. That is on the right-hand side.

Q. That is on the right-hand side. Now, what has happened on the left-hand side?

A. It has thickened at this point.

Q. You mean, it has thickened opposite the point "F" on Exhibit 25?

A. I probably should not say "thickened." It is stepped out beyond this plane.

Q. Beyond the plane of the bottom?

A. Yes.

Q. Do you see any evidences of any material having moved through the anchoring hole in the steel member?

A. There are a couple of depressions, three, I believe, that may be immediately above those anchoring holes there showing the tendency of the rubber to want to pull through from this point (indicating).

Q. You mean, from the left to the right on Exhibit 25? A. Yes.

Q. Through the anchor hole?

A. There are some depressions there that could be over those holes.

I have no way of telling whether they are or not.

Q. Well, if and when there is any breaking of the bond of the sealing element in connection with

(Deposition of Hugh T. Stewart.)

the internal metal flange to which it is attached, does that stop or affect in any way the continuance of the cold flow?

A. I would believe that the tendency to distort would be greater if that bond were released. That is bound to hold it back, where it is bonded.

Mr. Owen: That is all.

Mr. George I. Haight: That is all. [143]

(Deposition closed.) [144]

Mr. Owen: There is just one question I would like to ask Mr. Klein.

HAROLD H. KLEIN

Direct Examination

By Mr. Owen:

Q. Mr. Klein, you are the same Harold H. Klein who has been previously sworn and testified here today? A. Yes.

Q. You were present during the cross-examination of Mr. Stewart at which time he was asked to shove Exhibit 21 onto a short stub shaft produced by the defendant, which produced the split in the sealing member? A. Yes.

Q. Was that split there when you took the seal off at the end of its test? [145]

A. No. The seal was examined before putting it away, and it was not split at that time.

Mr. Owen: That is all.

(Deposition of Harold H. Klein.)

Cross-Examination

By Mr. George I. Haight:

Q. That shaft, however, when you caliper it is the same size as the one that is shown in Plaintiff's Exhibit 23, is it no?

A. There is no shaft shown here.

Q. What is the diameter of the shaft for which this is designed according to the drawing Plaintiff's Exhibit 23?

A. I have no record of the shaft size, but I assume it was a one and nine-sixteenths shaft.

Q. Will you caliper that and see if it is not one and nine-sixteenths?

A. That is right. It is one and nine-sixteenths.
Mr. George I. Haight: That is all.

Mr. Owen: That is all.

(Deposition closed.)

Mr. Owen: That is all of our testimony here today, Mr. Haight.

Mr. George I. Haight: You have not anything more to offer?

Mr. Owen: No.

Mr. George I. Haight: I simply want to show the dimensions of those springs in Plaintiff's Exhibits 21 and 22.

Mr. Owen: What?

Mr. George I. Haight: I want to show the dimensions of those springs in Plaintiff's Exhibits 21 and 22. I will ask that Mr. Batty be sworn. [148]

STANLEY C. BATTY

Direct Examination

By Mr. George I. Haight:

Q. Will you state your name, please?

A. Stanley C. Batty.

Q. Where do you reside, Mr. Batty?

A. At Melrose Park, Illinois.

Q. What is your occupation?

A. I am chief testing engineer for the Victor Manufacturing & Gasket Company.

Q. How long have you been with that company?

A. Nearly three years.

Q. How long in that capacity you have stated?

A. Nearly three years.

Q. Do you have any degrees from any college?

A. Yes. [149]

Q. What college?

A. Lewis Institute.

Q. And what degree?

A. Bachelor of Science in Mechanical Engineering.

Q. When did you receive that degree?

A. In 1938.

Q. Very generally what has been your experience?

A. I have worked for the American Can Company as analytical chemist and also as an experimenter on rubber cements for tin cans.

With this particular company my experience has been with oil seals, testing.

(Deposition of Stanley C. Batty.)

Q. Are you familiar with Plaintiff's Exhibits 21 and 22 that have been produced here?

A. Yes, I am.

Q. Have you made an observation of the springs appearing thereon? A. Yes sir, I have.

Q. Have you made any measurements of those springs? A. Yes.

Q. When did you make those measurements?

A. I made those measurements at this meeting.

Q. Did you ever see those before you came here today? [150] A. No, sir.

Q. Will you tell what measurements you took and the results, respectively, on Plaintiffs' Exhibits 21 and 22; and also tell us how you made those measurements?

A. On Exhibit 21 I counted the number of coils in the spring and found that there were 211 coils.

I removed the spring from the seal and measured the inside diameter of the spring with the Vernier caliper and found that the measurements varied between 1.654 to 1.640, making an average inside diameter of the spring of 1.647.

I then measured the diameter of the coil of the spring with a micrometer. This measured 0.134.

I then ascertained the diameter of the wire that was used, by counting the number of coils per inch of length. There were 40 coils to one inch, which corresponds to a wire diameter of 0.025.

I then took Exhibit No. 22 and counted the number of coils in that spring. There were 227 coils. I

(Deposition of Stanley C. Batty.)

then measured the inside diameter of that spring. The inside diameter varied between 1.792 to 1.746, making an average inside diameter of 1.769 inches.

I then measured the diameter of the coil of that spring. The measurement was 0.134. I then ascertained the diameter of the wire used in that spring. There were 40 coils to the inch, making a wire diameter of 0.025.

Mr. Haight: You may cross-examine.

Mr. Owen: No cross-examination, Mr. Haight.

Mr. George I. Haight: That is all I have.

(Deposition closed.)

Mr. Owen: Off the record.

(Discussion outside the record.)

Mr. George I. Haight: Let the record show it is agreed between counsel that the signatures to the depositions are waived, and the reporter will send them on to the Court.

Mr. Owen: The original to the clerk.

Mr. George I. Haight: Yes.

Mr. Owen: And I will return the exhibits which are out on a receipt to me.

Mr. George I. Haight: Yes.

Mr. Owen: This concludes the depositions.

[Endorsed]: Filed June 15, 1946. [153]

[Endorsed]: No. 11631. United States Circuit Court of Appeals for the Ninth Circuit. National Motor Bearing Co., Inc., a Corporation, Appellant, vs. Chanslor & Lyon Co., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 15, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11631

NATIONAL MOTOR BEARING CO., INC., a
corporation,

Appellant,

vs.

CHANSLOR & LYON CO., a Corporation,
Appellee.

STATEMENT OF POINTS UNDER RULE
19 (6) OF THIS COURT

The points relied upon in this appeal are:

1. That the evidence is insufficient to support the District Court's Memorandum of September

27, 1946; or its Findings VI, VII, and VIII and Conclusions of Law II, III, and IV; or its Judgment dated November 29, 1946 holding the claims invalid and finding laches.

2. That the evidence, when examined in the light of the uniform decisions of this Court, shows that the patent discloses and claims a meritorious and valid invention.
3. That defendant's device infringes the claim in suit and plaintiff is entitled to the relief prayed for.

Wherefore, appellant prays that the Judgment entered herein be reversed with directions to the Court below to proceed with an accounting and other relief appropriate to be given appellant, with the costs of this appeal to appellant.

Dated: May 28, 1947.

/s/ A. DONHAM OWEN,
Attorney for Appellant.

Two copies of the foregoing Statement of Points have been this day mailed to Messrs. Boyken, Mohler & Beckley, counsel for Appellee, at their Crocker Building address in San Francisco, Calif.

/s/ A. DONHAM OWEN.

[Endorsed]: Filed May 29, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION ON APPEAL UNDER RULE
19 (6) OF THIS COURT

Appellants hereby designate the parts of the record which they think necessary for the consideration of the appeal, said parts to be printed from the record, proceedings and evidence contained in the original certified record transmitted by the Clerk of the United States District Court for the Northern District of California, Southern Division, pursuant to the order of March . ., 1947.

1. Bill of Complaint—as corrected by Nov. 10, 1944, stipulation.

2. Answer of Defendant.

3. Motion for Further and Better Particulars.

4. Plaintiff's Bill of Particulars with exhibit attached.

5. Notice of Clerk that case will appear on the calendar January 8, 1945 to be set for trial.

6. Affidavit filed January 8, 1945 re setting for trial.

7. Stipulation resetting trial date.

8. Notice under U. S. Code Title 35, Sec. 69.

9. Motion for Permission to Take Proofs as to Defendant's Unpleaded So-called Victor Anticipation.

10. Affidavit re above motion.

11. Memorandum in opposition to plaintiff's motion to Take Additional Proofs.

12. Order Regarding Opening of Proofs.
13. Memorandum decision, September 27, 1946.
14. Court's Findings of Fact and Conclusions of Law filed November 29, 1946.
15. Judgment, filed November 29, 1946.
16. Defendant's Proposed Findings of Fact and Conclusions of Law filed October 16, 1946.
17. Plaintiff's Proposed Corrections to Findings filed November 14, 1946.
18. Notice of Appeal Under Rule 73 (b).
19. Reporter's Transcript (3 vols., pages 1 to 38, 50 to 274a) with the following omissions:
 - Page 2, line 5 to page 37, line 1, inclusive;
 - Page 38, line 7 to page 51, line 5, inclusive;
 - Page 94, line 24 to page 96, line 23, inclusive;
 - Page 97, line 2 to page 97, line 6, inclusive.
20. Concise Statement of Points under Rule 19 (6) of this court.
21. This Designation on appeal under Rule 19 (6) of this court.
22. Defendant's depositions of Remi J. Gits, Fred A. Reeves, James Zap and Beatric M. Krejci taken in Chicago on October 4, 1945 to be printed and bound with the trial transcript with omission of the unnecessary notarial data on pages 1 to 7, 75, 76, 95, 100, 101, 103, 106 to 109, inclusive.
23. Defendant's depositions of Fred L. Haushalter and G. L. Tarbox taken at Toledo on October 5, 1945 to be printed and bound with the trial transcript with omission of the notarial certificate.

24. Plaintiff's depositions of Harold H. Klein and Hugh T. Stewart and defendant's deposition of Stanley C. Batty taken in Chicago on June 7, 1946 to be printed and bound with the trial transcript with omission of the unnecessary notarial data on pages 1 to 4, 66, 67, 129, 144, 145, 146, 147, 149, 152, 154 to 157, inclusive.

25. Order for Transmittal of Original Exhibits.

26. The following designated plaintiff's exhibits, or portions thereof, to be contained in the Book of Exhibits:

1, 3, 6, 7, 8, 9, 10, 15 (page 51 only), 17, 20, 23, 24, 25 (this exhibit may be found bound in by reporter as page 83 of the Klein deposition.)

27. The following designated defendant's Exhibits, or portions thereof, to be contained in the Book of Exhibits:

B, C, F, H, I, J, K, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, AAA (omit duplicating the printed copy of pat. 2,146,677 and its drawings as they constitute plaintiff's Exhibit 1), AAB (this includes copies of 24 patents which counsel have ordered from the Patent Office and will supply to the Clerk, along with Exhibits 1, 17, 24, AAC and AAD which are also patents), AAC, AAD, AAF, AAG, AAH.

/s/ A. DONHAM OWEN,

Counsel for Appellant.

A copy of the foregoing Designation on Appeal has been served on counsel for Appellee A. W.

Boyken, Esq., by mailing two copies of the same to his office in the Crocker Building, San Francisco, California, this 28th day of May, 1947.

/s/ A. DONHAM OWEN.

[Endorsed]: Filed May 29, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED UNDER RULE 19 (6)

Appellee designates the following matter to be included and printed in the record on appeal in addition to the matters designated by appellant:

1. Cover page of plaintiff's Exhibit 11 (need not be reproduced in color).

Dated: June 6, 1947.

BOYKEN, MOHLER &
BECKLEY,

/s/ A. W. BOYKEN,

/s/ W. BRUCE BECKLEY,

Attorneys for Appellee.

Receipt of a copy of the foregoing acknowledged this 6th day of June, 1947.

/s/ A. DONHAM OWEN,

Attorney for Appellant.

[Endorsed]: Filed June 7, 1947.

No. 11,631

United States
Circuit Court of Appeals
For the Ninth Circuit

NATIONAL MOTOR BEARING CO., INC., A CORPORATION,
APPELLANT-PLAINTIFF,

v.

CHANSLOR & LYON CO., A CORPORATION,
APPELLEE-DEFENDANT.

APPELLANT'S OPENING BRIEF

A. DONHAM OWEN,
Counsel for Appellant-Plaintiff.

FILED
OCT 8 1947

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United States
Circuit Court of Appeals
For the Ninth Circuit

NATIONAL MOTOR BEARING CO., INC., A CORPORATION,
APPELLANT-PLAINTIFF,

v.

CHANSLOR & LYON CO., A CORPORATION,
APPELLEE-DEFENDANT.

APPELLANT'S OPENING BRIEF

This case is brought to this Court by the appeal of the plaintiff from the final judgment (p. 60) dismissing plaintiff's suit on the Johnson Patent for a Fluid Seal No. 2,146,677, having a single claim, granted February 7, 1939 on an application filed August 5, 1936 (p. 512).

The appellant-plaintiff, National Motor Bearing Co., Inc., is a California corporation.

The appellee-defendant, Chanslor & Lyon Co., a California corporation, sold the alleged infringing oil seals which were made by the Victor Manufacturing & Gasket Company of Chicago which is defending this suit (p. 125).

The case was heard in the United States District Court for the Northern District of California, Southern Division.

Jurisdiction in that Court was based upon Section 24 of the Judicial Code (28 USCA Sec. 41), alleged in the Complaint (p. 3) and admitted in the Answer (p. 11).

The final judgment was entered November 29, 1946 and the appeal to this Court was filed on February 25, 1947 (p. 61) based upon Section 128 of the Judicial Code (28 USCA Sec. 225) and upon Section 230 of Title 28 of the United States Code.

The District Court found the Johnson patent invalid for lack of invention and lack of novelty based on five prior patents (p. 57), and also dismissed the case on the ground of laches.

SPECIFICATION OF ERRORS

The errors of the District Court relied upon by the plaintiff occurred in the Court's findings of fact VI, VII and VIII (p. 57) and in its Conclusions of Law II, III and IV (p. 59).

Specifically these errors are:

1. That the Court found invalidity of the Johnson patent on the ground that the invention had been patented, described and fully disclosed in the patents of Chandler, 1,905,800, Fitzgerald, 1,983,746, Gits, 2,052,762, Heinze, 2,071,403, and Winter, 2,089,461 (p. 57).

This error is discussed *infra*, pp. 14-22.

2. That the Court found that there had been public use and sale in this country for more than two years prior to the filing of Johnson's patent (p. 58).

This error is discussed *infra*, p. 23.

3. That the Court found that each and every part of Johnson's invention had been invented, discovered,

used by or known to others in this country before his alleged invention (p. 58).

This error is discussed *infra*, p. 12.

4. That the Court found that in view of the prior art existing at the time, there was no invention in what Johnson claims to have invented (p. 58).

This error is discussed *infra*, p. 23.

5. That the Court found that what Johnson did involved nothing more than ordinary mechanical and engineering skill and practice and therefore lacked patentable novelty and invention (p. 58).

This error is discussed *infra*, p. 23.

6. That the Court found that there was delay in filing the suit which constituted laches (p. 58).

This error is discussed *infra*, p. 28.

STATEMENT OF THE CASE

The first issue in the case is whether the Johnson patent and its single claim is anticipated or rendered invalid by the following patents of the prior art relied upon by the District Court; namely:—

Chandler	1,905,800 (p. 667)
Fitzgerald	1,983,746 (p. 671)
Gits	2,052,762 (p. 701)
Heinze	2,071,403 (p. 707)
Winter	2,089,461 (p. 715)

These five patents, on which alone the District Court relied, are sufficient to illustrate the prior art. As we shall show, no one of them, or any or all of them taken together, discloses or suggests the invention defined in the claim of the Johnson patent in suit. That claim is directed

to the structure of the fluid seal shown in Figs. 1, 3, 5, and 6 of the drawings of the patent (p. 512).

The Johnson Patent in suit is for an oil or fluid seal which is employed to retain the oil or grease within the bearings or housing of rotating or reciprocating parts. A typical use is shown in the illustration of a gear-reducing unit of a machine at page 516, which is explained at page 67.

The patent explains (p. 1, col. 1, lines 3 to 52) the disadvantages of seals having either felt or leather sealing members and the difficulties theretofore experienced with seals having rubber or rubber-like composition sealing members. Johnson's invention was the first to overcome these difficulties and to produce a successful seal having such a rubber or rubber-like sealing member. He employs as a sealing member "an oil-resisting composition such as 'Duprene'. The composition can be varied to suit the material being sealed" (patent p. 1, col. 2, line 55).

The plaintiff itself, not being in the field of selling composition seals, had not commercialized the invention up to time of the trial (pp. 70, 80, 421). But there is no question in this case of the practical and successful advantage of the seals of the patent, for the Victor Company has made and sold large numbers of these seals (pp. 211, 243). They are shown as defendant's types H and A at the left of the Comparison Chart (p. 520) and in the chart (p. 521) in which the claim of the Johnson patent is applied to the Victor Seals. This shows that they embody each and every element of the Johnson claim and therefore infringe it. The District Court did not pass upon the question of infringement (p. 59).

In this art, in which over a thousand patents have been issued and only a few, about twenty, have proved successful in actual use (pp. 241, 281), the details or minutiae of the seal constructions are tremendous trifles which spell the difference between failure and success. The Johnson patent discloses and claims a novel organization composed of those details, which are combined to produce a new mode of operation and a novel, highly valuable commercial result.

None of the devices of the five prior patents relied on have this construction or mode of operation or have achieved any commercial success. The difference between Johnson's combination and the seals of the prior art is the difference between failure and success, which is cogent proof of novelty and patentability. *The Barbed Wire Patent*, 143 U.S. 275, 283.

As we point out later, the plaintiff has not been guilty of laches.

THE JOHNSON PATENT IN SUIT p. 513

The Johnson patent, after referring to the disadvantages of fluid seals in which the sealing member is either felt or leather, refers to the efforts to use "composition fluid seals made wholly of rubber or composition of similar characteristics" (p. 1, col. 1, line 37) and refers to the failure of prior seals of this sort under high heat and cooling and to the problem of "cold flow" which, prior to Johnson's invention, prevented the success of such seals.

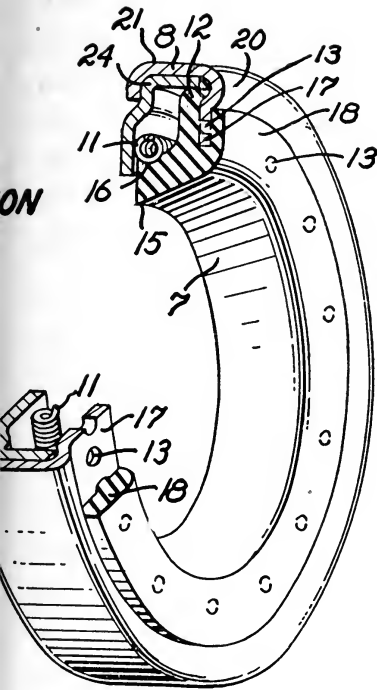
The device of Johnson is simple but remarkably and unexpectedly effective, differing as it does from the prior art in features which may seem details but which are of the greatest magnitude in practical accomplishment.

Referring to Fig. 1 of the Johnson patent there is a cup member 8 the periphery of which has a face 21 which makes a leak-tight press fit with the bore of the housing in which the seal is put.

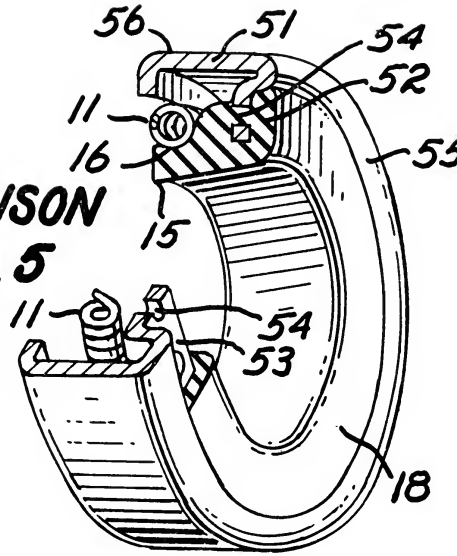
This cup member contains and supports the composition sealing member which makes the fluid-tight seal on the shaft. It has an inwardly projecting flange 20 which is bent inwardly in the direction of the axis of the shaft to form an axially inwardly offset flange 17 and is provided with holes 13 at intervals. This axially inwardly offset radial flange is the element to both sides of which the composition sealing member is bonded. This sealing member 7 has two outwardly extending annular parts, 12 and 18, between which the offset flange 17 of the cup projects. These annular parts, 12 and 18, are bonded to the flange by being molded thereto in the process of manufacture and by being tied together by the portions of the composition which extend through the holes 13 in the flange.

The patent states (p. 2, col. 1, line 4):

“ . . . It is preferable to sandblast radial wall 17 of cage 8 and apply a coat of cement which will insure a good bond between the composition and the metal. Next the composition is placed in the mold and the mold closed. Under pressure the composition material will flow into openings 13 of wall 17 and tie or bond the parts together. The mold is also shaped to form spring-receiving groove 16. As the composition cools it shrinks approximately one per cent, which further tends to make the composition material embrace the metal.”



**JOHNSON
FIG. 5**



The composition sealing member 7 has a sealing lip 15 which bears against the rotating or reciprocating shaft and against which it is held by its own resiliency assisted by the spring 11 in the groove 16 close to the lip of the sealing member. An inner case member 24 closes the end of the cup and holds the spring. The outer end of the rim of the cup 21 is spun over this inner case to hold it in.

Fig. 5 of the Johnson patent shows a similar but slightly different form of seal. The outer cup 51 has the peripheral bearing surface 56 and is bent axially inward to form a flange 53 having holes 54. The sealing member has two outwardly extending annular parts, one on each side of the cup flange 53, and a sealing lip 15 with a groove 16 to hold the spring 11.

The patent, in describing the making of the oil seal, states (p. 2, col. 2, lines 23 to 28):

“In this type the composition material will flow on both sides of radial portion 53 into holes 54. It will adhere to the sides of radial portion 53 and the composition which has flowed through holes 54 further strengthens the bond between the composition material and metal.”

In both types of seals of Fig. 1 and Fig. 5 of the Johnson patent, the offsetting of the side of the cup, to form the inwardly extending flange to which the sealing member is bonded, brings the outer radial face of the sealing member within the radial plane of the bottom 20 (Fig. 1), 55 (Fig. 5) of the cup so as to protect the sealing member from wear due to possible contact with any adjacent moving parts.

The claim of the Johnson patent is as follows:

“An oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in a housing, comprising a cup member having a peripheral portion and an axially inwardly offset radial flange, a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.”

The principal merit of the Johnson seal is that it solved the problem of how to construct a fluid seal having a composition sealing member by the combination of the several features specified in the claim, all of which are embodied in the infringing Victor seals.

One important feature is the provision of a composition sealing member having two outwardly extending annular parts which embrace and are molded to both sides of the inwardly extending offset flange of the outer cup and are tied together with composition material which unites each of these annular parts through the holes 13 in the flange of the cup. By this construction the sealing member is permanently fixed in position. It is not under pressure as it would be if it were clamped into the outer cup. Thus loosening and leaking due to cold flow are prevented and the axial position of the sealing lip 15 is controlled (pp. 329-332).

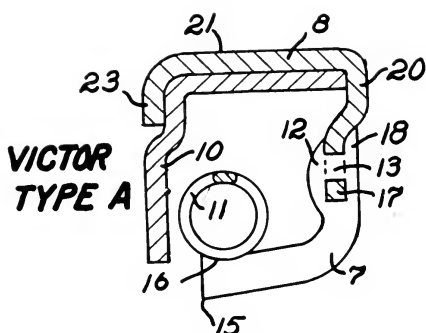
Another feature which contributes to the success of the seal is the protection of the annular part of the sealing member which is bonded to the outer side of the cup flange by bringing the outer radial face of that part of the sealing member within the radial plane of the cup bottom.

VICTOR INFRINGING FLUID SEALS

The fluid seals made by the Victor Co. and sold by the defendant are of two types, A and H. Type A is illustrated in Defendant's Type "A" Device in Suit (p. 517), in Fig. 2 of the drawing Typical Infringing Devices (p. 519) and in the lower left hand drawing of the Comparison Chart (p. 520).

The infringing type H is shown in Defendant's Type "H" Device in Suit (p. 518), in Fig. 1 of the drawing Typical Infringing Devices (p. 519) and in the upper left hand drawing of the Comparison Chart (p. 520).

Type A is shown in the accompanying drawing. As it closely resembles Fig. 1 of the Johnson patent the principal reference numerals of the patent have been applied

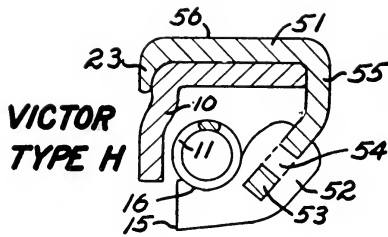


to the drawing. The outer cup 8 has a side wall 20 which is bent inward axially to form a radial flange 17. This flange has holes or perforations 13. The molded composition 7 has two outwardly extending parts 12 and 18 which embrace the radial flange 17 on both its sides. The composition, which has flowed through the holes 13 of the flange in the manufacture of the seal, ties together the two parts 12 and 18. The adhesion between the flange 17 and the parts 12 and 18 and the ties between those parts bond the molded material securely to the flange 17 of the cup 8. The outside of the molded material 18 is within the radial plane of the radial wall 20 of the cup 8.

The seal is provided with a garter spring 11 which sits in a groove 16 in the axially extending sealing member, which terminates in a sealing lip 15. An inner cup 10, which serves to hold the spring 11 in place, is held in by the spun-over lip 23 of the outer cup 8.

This construction is in all essential respects identical with Fig. 1 of the Johnson patent in suit; in fact, it is a Chinese copy. Victor's Type A seal embodies every element of the claim of the Johnson patent.

The Victor Type H is shown in the accompanying drawing. It is a close copy of Fig. 5 of the Johnson patent. It



consists of a cup 51 having a radial flange 55 with a bent-in portion 53 having holes 54. The portion 53 is embraced by the two parts of the sealing composition, which adheres to it on both sides and extends through the holes 54, thus bonding the sealing member to the inwardly bent flange of the cup member whereby a secure and permanent bond is effected. The outer radial face of the sealing member lies within the radial plane of the cup bottom to protect it against contact with any moving parts. The seal is provided with a garter spring 11 held in a groove 16 in the sealing member. A cup member 10 holds the spring from escaping. The inner edge 23 of the cup 51 is spun over the inner cup.

The infringing type H is a Chinese copy of Fig. 5 of the Johnson patent except that it includes an inner cup 10, which is a detail taken from Fig. 1 of the Johnson patent.

Defendant's type H oil seal is therefore an embodiment of all the elements of the claim of the Johnson patent and infringes it.

On page 521 of the record there is a chart in which each element of the claim of the Johnson patent is applied to the corresponding elements of the Victor Type H and Type A seals.

JOHNSON'S DATE OF INVENTION

It is necessary to refer to Johnson's date of invention and reduction to practice in 1935, because defendant attempts to justify the infringement of the accused Victor oil seals Types A and H on the ground that these seals antedated Johnson's filing date of August 5, 1936 by a month or two.

The District Court Finding VIII (p. 58) erroneously states that "The accused structures were on sale beginning in the summer of 1935." All the testimony on the subject appears in the record at pages 188 to 194. The earliest date given by the Victor witness was a sale of the Type A seal on July 9, 1936 (p. 189) and of the Type H seal on November 10, 1936 (p. 190). This was over a year after Johnson had made the invention and reduced it to practice.

The proofs establish that Johnson seals of the claim of the patent were invented, reduced to practice and tested in 1935.

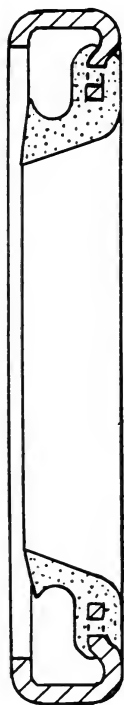
Johnson's undisputed proofs show that the first sketch of his seal was made May 23, 1935 (Exhibit 20, p. 532). Assembly and engineering prints were made by August 13, 1935 (Exhibit 23, pp. 533-536). Molds were made and the actual seal (Exhibit 21) was put through the usual tests from September 9, 1935 to October 7, 1935 in a regular testing head which simulated actual working conditions (pp. 267, 235, 415). At the conclusion of the tests the construction was decided to be very satisfactory (pp. 241, 402). The original tested sample (Exhibit 21) and another sample (Exhibit 22) made at the same time in 1935 were introduced in evidence.

These proofs show completion of the Johnson invention by October 7, 1935, which is almost a full year before the

Victor Type A and Type H oil seals were even thought of. Because of this, the defense fails under the rule of law that a defendant who seeks to justify its infringement by antedating the plaintiff's patent must carry its date back of the plaintiff's inventor's date of reduction to practice. Victor failed to do it in this case. On the other hand, plaintiff has fully sustained its burden of proof in this situation. *Willard v. Union Tool Co.*, 253 Fed. 48 (CCA 9).

Defendant noted that on the samples, as they are today, the outside face of the composition extended in places a few thousandths of an inch beyond the bottom of the metal case (p. 425). The original assembly drawing (Exhibit 23)

is reproduced here and appears in the record at page 533. It showed the outside section of the composition as being within the radial plane of the cup bottom. Mr. Klein, who supervised the making and testing of these seals, testified that when made and tested in 1935 they were buffed by him to be within that radial plane (pp. 405, 419). He attributed the change in shape in the intervening eleven years to "cold flow" which is a characteristic of all composition materials kept under pressure. In exhibits 21 and 22 the coil springs had kept the sealing lips under pressure for eleven years (pp. 405, 425, 429). Mr. Stewart, an experienced worker with rubber and rubber-like materials, explained how the force of the spring around the sealing flange had caused the



sealing element to change to its present shape (pp. 448-454).

THE PRIOR ART

As the District Court based its conclusion that the Johnson patent in suit was invalid on each of five patents of the prior art, it is necessary here only to point out that none of these patents disclose or suggest the combination of the vital features of the Johnson claim. As exemplified by the Victor seals, which are Chinese copies of Figs. 1 and 5 of the Johnson patent, the Johnson invention has proved to be a practical and commercial success while all of the patents cited as anticipatory or as negating invention, never have been of any practical use in the art (pp. 242, 243). The prior devices would all leak if constructed with rubber or rubber-like sealing members (pp. 244, 245, 329-332, 398).

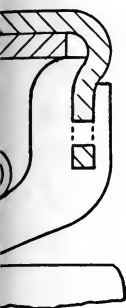
In the accompanying drawing the first line shows the essential features of the Johnson patent and of the infringing Victor Types A and H. In each one of these seals the outer cup has an axial inwardly offset radial flange having holes or perforations, which flange is embraced by the two outwardly extending parts of the composition sealing element which adhere one to each side of the flange and which are tied together by portions of the material which extend through the holes in the flange of the cup.

This feature alone distinguishes the seals of the Johnson patent and the alleged infringing Victor seals from the prior art. But this is not the only common feature which distinguishes them from the prior art as we shall point out.

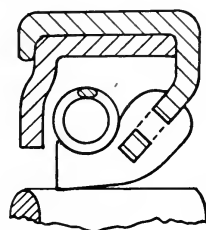
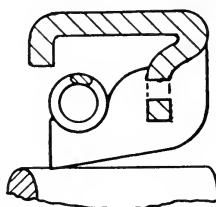
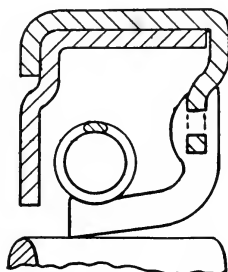
In the second and third lines of the drawing are illustrations of each of the five prior patents on which the Dis-

THE DEVICES IN SUIT

JOHNSON'S = DEFENDANT'S
FIG. 1 TYPE A



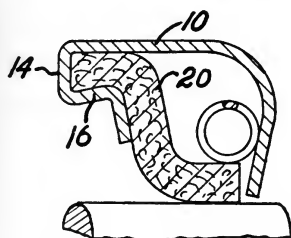
JOHNSON'S = DEFENDANT'S
FIG. 5 TYPE H



THE PRIOR ART

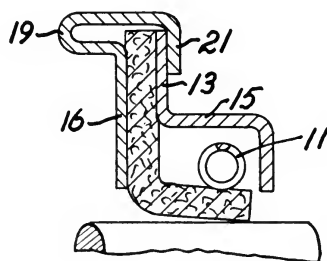
CHANDLER 1,905,800

FIG. 2 - p. 667



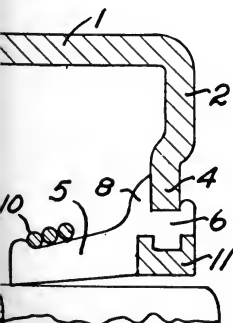
FITZGERALD 1,983,746

FIG. 1 - p. 671



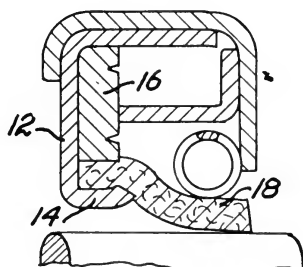
TS 2,052,762

FIG. 1 - p. 701



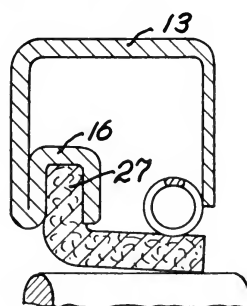
HEINZE 2,071,403

FIG. 1 - p. 707



WINTER 2,089,400

FIG. 3 - p. 715



trict Court relied for its findings of invalidity of the Johnson patent in suit.

In each and every device of the prior art the sealing member is held by clamps which hold it by squeezing it in an annular recess. Thus the sealing member is held under compressive pressure and, as the seal is alternately heated and cooled, the composition sealing material has what is known as "cold flow" (pp. 329-332). Thus the material under pressure flows from where it is compressed to where it is free from pressure. Thus the material distorts and loosens, the lip of the seal is not controlled, and the seal leaks. Thereby its usefulness as a seal is destroyed (pp. 332, 398).

In the Johnson seal and in the Victor infringing seals, the sealing member is held in the case without being under pressure and therefore is not subject to cold flow, which causes leaks. This is a mode of operation which was new with Johnson and is copied in the Victor seals.

The result is that for the first time in this art seals made with composition sealing members do not leak and therefore are commercially successful (pp. 211, 243).

CHANDLER PATENT No. 1,905,800 (p. 667)

This patent granted in 1933 shows a seal composed of a cup 10 (Fig. 3) which is bent inwardly and axially and then inwardly again to form a recess into which the end of the sealing member, preferably of leather, extends and is clamped as by a vise. The sealing member extends inwardly to contact with the shaft and its end is pressed thereon by the usual coil spring.

Chandler shows means for clamping the end of the sealing member which would be absolutely ineffective if the

sealing member were composed of rubber or rubber-like composition materials, because under the stresses and strain of actual operation the sealing member would flow out of the vise and, becoming loose, would thereby render the seal inoperative. The Chandler patent thus provides nothing to prevent the effect of cold flow of such material, which would destroy the usefulness of the seal. The record does not show that any of the Chandler seals went into actual use.

The Chandler patent was cited against the application of the Johnson patent in suit and its irrelevancy established (pp. 613, 627).

FITZGERALD PATENT No. 1,983,746 (p. 671)

This patent shows a seal having a cup which has two inwardly extending flanges 16 and 21. It has an inner cup 15 which holds the spring 11 and has a radial flange 13 inside the radial flange 21 of the outer cup. The sealing member, which is merely defined as flexible packing, is clamped between the radial flanges 13 and 16.

The device is substantially similar to the Chandler patent except that the clamp in Fitzgerald is radial while the clamp in Chandler is axial. If the sealing member were composed of rubber or rubber-like composition, it would be subject to the same cold flow and separation from the clamping flanges as in Chandler and would quickly become loose and leak. There is no showing that any of the Fitzgerald oil seals went into actual use. It is no more pertinent than the Chandler patent, a file wrapper reference, as defendant's expert admitted (p. 223).

GITS PATENT No. 2,052,762 (p. 701)

This patent discloses an oil seal having an outer cup 1 with an inwardly radial flange 2 which is bent axially to form an inner flange 4 which bears against the outside of the sealing member 6 which is of rubber-like material in Figs. 1, 2, and 5 and of leather in Fig. 6. The sealing member has a positioning shoulder 8 which bears against the radial flange 4 of the outer cup. An inner ductile ring 11 is expanded against the sealing member at 6 so as to clamp it between the inner cylindrical face of the flange 4 and the outer cylindrical face of the ductile ring 11. Thus the sealing member is clamped, as in a vise, between the flange 4 and the ductile ring 11.

Testimony as to the devices of the Gits patent showed that, while the seals with leather sealing members were satisfactory, those made with synthetic rubber were failures because they were subject to cold flow, became loose and leaked (p. 329).

“Q. You have never made, then, and sold any devices like your patent 2,052,762 with a synthetic sealing member in them except for those experimental samples you furnished to Spicer?

A. No, we didn't.” (Gits, p. 332).

For about two and one-half years Gits and the Spicer Mfg. Co. and the B. F. Goodrich Co. struggled to make successful seals with rubber or rubber-like sealing members, but they failed as Gits admitted.

Gits also admitted that the reason why such seals failed was because the sealing member was held in place merely by clamps as in a vise and that due to cold flow the synthetic sealing member loosened up and the seals would

leak (Gits, pp. 328-333). It never occurred to Gits to solve the problem in the way that Johnson did later.

Tarbox, the experimental engineer of the Spicer Co. where Gits worked for those two and a half years trying vainly to make his synthetic construction operative, testified (p. 398):

Q. And the seals like Defendant's Exhibit D never got beyond the sample stage; you never ordered those in quantities?

A. No. We never did. The final test on them showed they were not satisfactory.

Haushalter, development engineer in the New Products Department of the B. F. Goodrich Rubber Co. in Akron, Ohio, testified that the Goodrich Co. cooperated with the Spicer Co. in trying to make the Gits seals with the synthetic sealing member work, but that the seals leaked and the effort to make them was abandoned (pp. 367-384).

The Gits patent and the history of devices made under it are convincing proof that in a seal in which the sealing member is rubber or a rubber-like material, a clamp to hold such a member in place permits cold flow and results in leakage and consequent failure. The pressure of the clamp is fatal in such a seal although it is practical where the sealing member is leather.

Until Johnson made his invention of a seal in which the sealing member of composition material is fixed in place without pressure and therefore not subject to cold flow, no one knew how to make a seal with such a sealing member that would not cold flow and leak.

HEINZE PATENT No. 2,071,403 (p. 707)

This patent shows a seal in which the end of the sealing member of "leather or some similar flexible material" (p. 1, col. 2, line 25) is clamped between the inner end of the washer 16 and the turned-in edge 14 of the cup member 12. This clamp is practically the same as that in the Chandler patent and, if the sealing member were made out of composition material, the cold flow would cause the sealing member to escape from the clamp and the seal would leak and become worthless. There is no evidence that the Heinze device, although owned by the Victor Co., was ever put to practical use, but it made and sold the seals here in issue, which are the same as those shown and claimed in the Johnson patent.

WINTER PATENT No. 2,089,461 (p. 714)

This Winter patent discloses an oil seal in which the end of the sealing member "preferably of leather" (p. 1, col. 2, line 18) is clamped between inwardly extending flanges of the outer cup 13 in Fig. 5. The clamp in Fig. 4 is between axial flanges. In either case if the sealing material was a rubber or rubber-like composition, the pressure would cause it to cold flow and the seal would leak. There is no showing that the Winter seal ever went into actual use.

THE MANY PATENTS NOT RELIED ON BY THE DISTRICT COURT

In addition to the five patents above discussed, on which alone the District Court relied, a large number of other patents were offered in evidence and most of them discussed by the defendant at the trial.

These patents are:

*Cantrell	Re 15,061
Godley	1,040,308
Frumveller	1,617,587
Loock	1,740,929
*Penick	1,817,095
Lee	1,862,153
*Gits	1,925,729
Cunningham	1,930,708
Lord	1,996,210
Larsh	2,000,341
Miller	2,004,669
Anderson	2,013,333
*Walker	2,028,634
*Christensen	2,052,603
Padgett	2,093,572
Oldberg	2,094,160
Peterson	2,114,908
Heinze	2,116,240

*Cited in the Patent Office file wrapper against the application for the Johnson patent.

As none of these patents were considered worthy of reference by the District Court or set up as pertinent in defendant's request for findings (p. 38), we do not feel called upon here to discuss any of them although, if necessary, it can be shown that none of them are any more relevant to the Johnson patent in suit than the five patents relied on by the District Court and discussed above.

NO ANTICIPATION

Thus it appears that in each one of the prior art patented devices relied on by the District Court, there is merely a clamp for holding the sealing member in place which would be totally ineffective if the sealing member were composed of material such as rubber or the like.

In the devices of the Johnson patent and in the Victor infringing seals there is no clamping device, but in each case the sealing member has two outwardly extending parts which embrace and adhere to an axially inwardly offset flange of the outer cup and are bonded thereto not only by such adherence but by the integral material extending through holes in the flange and tying the two outwardly extending annular parts together. This feature of Johnson's combination was new in fluid seals of the sort here in issue.

The new mode of operation in a fluid seal is that the material of the sealing member is held without being under pressure. The Johnson sealing member is therefore not subject to compression, which would cause cold flow and the loosening of the sealing member in its case. Gits' failure at Spicer conclusively establishes what happens, as it did happen, when an attempt was made to clamp a rubber or rubber-like sealing member in place. It just would not stay fixed but would become loose in the case, would leak and would not hold the sealing lip under control.

The testimony as to the Gits struggle and failure demonstrates that there was a demand for a fluid seal having a rubber or rubber-like sealing member, which for certain uses would be greatly superior to leather or

felt, but that those skilled in the art were unable to solve the problem and satisfy the demand (pp. 368, 371, 398).

NO TWO-YEAR PUBLIC USE

The second finding of the District Court, as to which error is alleged, is that there was public use or sale of Johnson's invention more than two years prior to his filing date, August 5, 1936 (p. 58).

There is no evidence of public use or sale of any devices except those which were tried by Gits beginning in 1933, which were demonstrated failures, and were abandoned.

As these Gits devices have already been discussed, at page 18, *supra*, there is no need to refer to them again in showing the erroneous nature of this finding.

PATENTABLE INVENTION VS. MECHANICAL SKILL

The foregoing has established the following facts:

1. That the structure of the Johnson oil seal was new with Johnson.
2. That the defendant's seals A and H are infringements, in fact these Victor seals are substantial Chinese copies respectively of Figs. 1 and 5 of the Johnson patent.
3. The commercial success of these Victor seals establishes the practical value of Johnson's invention, copied by Victor, even although the plaintiff itself for its own good reasons had not marketed the Johnson seals up to the time of the trial.

In *Smokador Mfg. Co. v. Tubular Products Co.*, 31 F. (2d) 255 (CCA 2), Judge Hand said:

"It is true that the complainant has not put an ash stand made in accordance with the patent on the

market, but this makes no difference, for the defendant has sold 1,000 of these ash stands. That is a substantial tribute by defendant to the value of the invention.”

4. The Johnson seals and the Victor infringing seals have a mode of operation new with Johnson, which is that the flexible sealing member is not under any compression as held in the cup member and therefore is not subject to cold flow.

5. The result is that the Johnson seal was the first seal with a rubber or rubber-like sealing member, which maintains the sealing member in permanent fixed leak-tight engagement in the cup and fixes the sealing lip in correct position on the shaft and in relation to the cup.

6. Prior to Johnson there was a recognized demand for a fluid seal to achieve this result and those skilled in the art struggled for years to produce such a seal. Their attempts resulted only in failure because they did not have the conception of Johnson's construction and combination.

7. The Victor Co. recognized patentable invention in the Johnson seal, for it took out the Heinze and Bernstein patent No. 2,240,332 (p. 539) issued April 29, 1941 on an application filed January 28, 1939. This patent shows and claims the infringing Type H seal, Fig. 1, in which the only difference from the seal of Johnson's Fig. 5 (p. 512) is that in Heinze the inner edge of the flange of the cup to which the sealing member is bonded is turned in more axially than in Johnson. The basic structure, the mode of operation and the result are all the same as in Johnson.

The Heinze patent (p. 1, col. 2, lines 7-15) states:

“It will be noted that the side wall of the metal shell section 58 (55 in Johnson, Fig. 5) has an inwardly

projecting flange 60 (53 in Johnson) disposed at an acute angle with respect to the axis of the shell and provided with openings 57 (54 in Johnson) therein through which portions of the flexible material flow during the molding and vulcanizing operation, thereby forming a permanent attachment between the metal and synthetic rubber or other material.”

It comes with very bad grace, to say the least, for the Victor Co. to assert patentable invention in a very small difference from the Johnson seal as an improvement thereon and yet to contend that the Johnson seal, which is the basis of the Heinze seal, lacks patentable quality.

In *David et al. v. Harris*, 206 Fed. 902, 903, 904 (CCA 2), the Court had a similar situation and said:

“The fact that the defendant is making his sweaters under a subsequent patent to Rautenberg makes the defense of lack of novelty and invention come with rather poor grace from one who is asserting that even after the complainants’ patent there was still room for invention.

“The questions whether the patented sweater involves invention and whether the claims are infringed are not entirely free from doubt upon the proof, but we are inclined to answer them in favor of the complainants, first, because of the presumption arising from the grant of the patent; second, because the prior art shows many attempts to accomplish the same result without success; and third, because it seems quite inconsistent for one who is operating under the Rautenberg patent to deny patentability to the Weinschenk sweater.”

These are the circumstances which the courts in patent cases have recognized as convincing evidence of patentability.

In *Eibel Process Company v. Minnesota, etc., Co.*, 261 U.S. 45, the Court, in sustaining the patent, said (p. 63):

“In administering the patent law the court first looks into the art to find what the real merit of the alleged discovery or invention is and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent to secure to the inventor the reward he deserves.”

In the *Sinclair & Carroll Co., Inc. v. Interchemical Corp.*, 325 U.S. 327, the Supreme Court said (pp. 330, 331):

“The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure. See *Hartford Empire Co. v. United States*, 323 U.S. 386, 432-433. Consequently, it is not concerned with the quality of the inventor’s mind, but with the quality of his product.”

For the first time in the art Johnson’s invention gave the public a fluid seal having a sealing member of rubber or rubber-like material which was permanently leakproof and commercially successful.

Now the defendant sees fit to decry this accomplishment and praises the prior art as being for substantially the same thing. On the contrary, the difference is the difference between failure and success.

As the Supreme Court said in *The Barbed Wire Patent*, 143 U.S. 275, 283, in sustaining the patent—

“In the law of patents it is the last step that wins.”

The Supreme Court in *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U.S. 428, in holding the Grant patent valid, stated (p. 435):

“Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration.”

The Court further said (p. 441):

“The prior art was open to the Rubber Company. That ‘art was crowded’, it says, ‘with numerous prototypes and predecessors’ of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the Rubber Company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation as others have done.”

See also:

Bankers' Utilities Co., Inc. v. Pacific National Bank,

18 F.(2) 16, 18 (CCA 9);

Page et al. v. Myers, 155 F.(2) 57, 59 (CCA 9);

Goodyear Co. v. Ray-O-Vac, 321 U.S. 275.

Thus infringement, utility and patentable novelty have been established.

Non-user by the plaintiff of Johnson's invention is no ground for withholding from the plaintiff full relief under its patent. *Paper Bag Patent Case*, 210 U.S. 405, 422-430.

NO LACHES

The plaintiff has not been guilty of laches in attempting to establish its rights in the Johnson patent in suit and in bringing this suit against the defendant. Finding VIII (p. 58).

At page 12, *supra*, we showed the mistake of the District Court in Finding VIII in respect to the date that Victor began to sell the accused structure, which was in 1936. Purchases were not made from the defendant Chanslor & Lyon until 1939, after the patent in suit issued (p. 72). Additional errors in the finding will be shown here.

When the Johnson patent was issued February 7, 1939, the Victor Co. was making and selling its Types A and H seals and the plaintiff immediately notified Victor that these seals were an infringement of its patent (p. 72).

The plaintiff and the Victor Co. entered into negotiations involving several talks between the officers of the two companies in an effort to settle the question of infringement. One proposal was for the Victor Co. to take a license under the Johnson patent. Another was for the Victor Co. to buy the patent and issue a license to the plaintiff (p. 73). But the Victor Co. offered only \$2,000 in settlement and the plaintiff regarded this as too small so that the negotiations were suspended in 1939 (p. 88). The plaintiff, however, did not give up hope of making a satisfactory settlement until 1940 (p. 74).

By that time England and Germany were at war and the plaintiff was notified by the U.S. Government that it would need millions of seals for war equipment and new factories were built. The plaintiff had its hands full in satisfying the demands of the Government for its oil seals (p. 74). This was no time to be bringing suit on the Johnson patent against the Victor oil seals. The plaintiff had notified the Victor Co. of infringement, and the Victor Co. had persisted in its infringement and had not changed its position in any way in defiance of the patent.

After the United States entered the war in December, 1941, it would have been improper for the plaintiff to have brought suit. Thus the matter rested until 1944 when plaintiff had indications from the Government that the war was about to end and then the suit was promptly filed (p. 74). Even then the trial of the case was postponed with the consent of the Court until the war orders for plaintiff's seals substantially diminished (p. 75).

“It has been frequently held that the unusual years during and immediately after the great war constitute a period in which all reasonable postponement and suspension of litigation was a *public duty*.”

Alliance v. DeVilbiss, 41 F.(2) 668, 669 (1930).

There was therefore no laches by the plaintiff with respect to the Victor Co.

The defendant, Chanslor & Lyon Co., is in no better position to assert laches than the Victor Co., which was responsible for the defendant's infringing seals. Having notified the manufacturer of infringement in 1939, it would have been improper for plaintiff to have notified Victor's customers until it was possible to file suit.

The Chanslor & Lyon Co., of course, expected the Victor Co. to take care of it in the event of a patent suit. Mr. Lyon was on the stand, under a subpoena from plaintiff, to establish the fact that the Victor Co. was conducting and controlling this suit (pp. 115 and 125), but Victor's counsel made no showing that Chanslor & Lyon had changed its position at any time so as to give any basis for an estoppel in equity. The fact is that the defendant never changed its position with respect to the infringement because for a time no suit was brought against it.

Another controlling fact is that the suit was brought 5 years and 5 months after the patent issued, which is less than the statutory period of 6 years allowed for the bringing of suits for alleged infringement.* Also, it is less than 5 years and 9 months delay in *Craftint v. Baker*, 94 F.(2) 369, 374 (CCA 9), which this Court held was not a sufficient period to establish laches.

The lower court also overlooked the distinction between the case where there was a 9 year delay and the patent had expired as it had in *Gillons v. Shell*, 86 F.(2) 600 (CCA 9), and where the patent is still alive as it is here, so that plaintiff is entitled to an injunction even if the delay might preclude recovery of past profits. This Court's opinion at page 608 makes this point clear where it refers to the rule in the Supreme Court. At most, the delay might militate against a recovery for damages and profits against the Chanslor & Lyon Co. but it would be

*In 35 U.S.C.A. 70, it is provided: "But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action."

no bar to an injunction against it and Finding VIII is clearly erroneous.

CONCLUSION

The structures of the defendant's devices are identical with those of the Johnson patent. Infringement therefore follows, and for the same reason defendant cannot deny utility. The continuance of Victor's copying of the Johnson construction after notice of infringement shows that, in spite of all the prior art, Victor considered that those Johnson constructions were the only ones that would answer the commercial requirements.

Moreover, Victor cannot well deny patentable novelty, for it sought and obtained a patent on its type H seal claiming it to be a patentable improvement on the basic Johnson patent.

When, as here, only failures of the prior art are offered to show lack of invention, we may well ask, Why were they failures? And why does not the defendant adopt them? The answer is that the prior art devices offered no solution to the problem which Johnson solved. On the contrary, Gits and the engineers of Spicer and of Goodrich worked on it fruitlessly for several years. The problem thus proved to be beyond solution by the man skilled in the art. It took a new concept by Johnson to achieve the solution, resulting in the only successful structure for oil seals having a rubber or rubber-like sealing member held leakproof in a case.

The Johnson patent and its claim are for a novel combination which secures a new mode of operation in that the sealing member is bonded to the flange of the case

without any compression whatever, and it achieves a new result in that it is permanent and leak-proof.

Under all the criteria of patentable invention, the Johnson seal is novel and patentable.

The plaintiff has not been guilty of laches in bringing this suit.

For these reasons, it is submitted that the final judgment of the District Court should be reversed and the District Court should be directed to enter judgment sustaining the Johnson patent in suit as to its single claim and ordering an injunction against the defendant, an accounting for damages and profits and costs to the plaintiff-appellant.

For these reasons the plaintiff should prevail.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL MOTOR BEARING CO., INC.,
a Corporation,
Appellant-Plaintiff,
vs.

CHANSLOR & LYON CO., a Corporation,
Appellee-Defendant.

BRIEF FOR APPELLEE.

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FILED

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PAUL P. O'BRIEN,
CLERK

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NO. 11,631

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL MOTOR BEARING CO., INC.,

a Corporation,

Appellant-Plaintiff,

vs.

CHANSLOR & LYON CO., a Corporation,

Appellee-Defendant.

BRIEF FOR APPELLEE.

Statement of the Case.

This is a patent infringement case. The Trial Court held the single claim of the patent in suit invalid on each of two grounds—lack of novelty, and lack of invention. (Memorandum Decision, R. p. 37; Findings of Fact and Conclusions of Law, R. p. 56; Judgment, R. p. 60).

The Appellant (the plaintiff below) urges error in Findings of Fact VI, VII, and VIII and in Conclusions of Law II, III, and IV. The legal conclusions (the patent is invalid for lack of novelty, the patent is invalid for lack of invention, and the complaint should be dismissed), are unquestionably sound if the fact findings are taken as true. Thus, there is presented no alleged error of law, but merely

alleged errors of fact. It is to be noted that the Findings of Fact are not those proposed by the parties, but were prepared by the Trial Court, itself (R. p. 56). Thus, Rule 52(a) of the Rules of Civil Procedure, which provides that "Findings of Fact shall not be set aside unless clearly erroneous . . .", applies with special force to the instant case.

The facts found by the Trial Court, any one of which supports a legal conclusion of invalidity, are (R. pp. 57-58):

1. The structure of the Johnson claim was disclosed by the prior art patent to Chandler, No. 1,905,800;

2. The structure of the Johnson claim was disclosed by the prior art patent to Fitzgerald No. 1,983,746.

3. The structure of the Johnson claim was disclosed by the prior art patent to Gits No. 2,052,762.

4. The structure of the Johnson claim was disclosed by the prior art patent to Heinze No. 2,071,403.

5. The structure of the Johnson claim was disclosed by the prior art patent to Winter No. 2,089,461.

6. Johnson was not the original, first and true inventor or discoveror of the alleged invention or any material or substantial part thereof.

7. The structure claimed by Johnson was in public use and on sale more than two years prior to Johnson's application.

8. There was no invention in what Johnson claimed, and nothing more than ordinary mechanical and engineering skill and practice.

It will be pointed out hereinafter, that none of these fact findings are clearly erroneous, and that each is fully supported by the evidence. Further, it will be pointed out that although the Trial Court did not pass on the question of infringement, since the accused structures, themselves, were on sale prior to the filing of Johnson's patent application the patent cannot be both valid and infringed. An additional defense, which developed on the reopening of the proofs (on motion of the plaintiff) and which was not decided by the Trial Court, is that if there had been an invention, it was the invention of one Klein or at least a joint invention of Johnson and Klein and the patent to Johnson, as sole patentee, is void.

ARGUMENT.

The Disclosure and Claim of the Johnson Patent.

(Appellant's Opening Brief pp. 5-9)

The Johnson patent No. 2,146,677 (R. p. 513) relates to a mechanically simple structure. Sufficient details of the disclosed structures appear at pp. 6 and 7 of Appellant's Opening Brief. However, in order to show what Johnson's alleged invention was, a brief analysis of his disclosure and claim is required.

The first portion of the specification is devoted to calling attention to features said to be objectionable in prior oil seals. Seals using felt as the sealing member are unsatisfactory because the felt acts like a wick and draws oil (R. p. 513, col. 1, lines 3-14). Seals using leather for the sealing element, though widely used, present difficulties in securing the sealing member in a leak-tight, non-rotative fit. Also, as the leather becomes softened by the action of the oil, a greater sealing surface is brought into contact with the moving part, resulting in greater friction. Also, leather is not uniform in texture; therefore, a large sealing edge must be in contact with the movable shaft. This also results in greater friction. Finally, the lack of uniformity of leather presents manufacturing problems (R. p. 513, col. 1, lines 15-36).

Fluid seals made of rubber or composition with reinforcing means embedded near the outer rim expand as a result of frictional heat, thereby developing greater friction and more heat until the units are compressed beyond their elastic limit, and on cooling shrink and leak. Further "cold flow" is a problem with a composition or rubber seal (R. p. 513, col. 1, lines 37-52).

The patent continues with a statement that these and other defects present a problem in the newer and faster automobiles and other machinery which operate with so much higher shaft speeds. There are five stated objectives, the most specific of which is the first (R. p. 513, col. 2, lines 3-10):

“to combine the good features of the metal encased seal and of the composition seal, to provide a fluid seal having a metal or rigid heel portion and a sealing lip made of composition material in which the bearing area of the sealing lip on the movable part is small, resulting in low frictional resistance and cool operation.”

The patent continues with a description of the six different modifications illustrated. The form shown in Fig. 1 consists of four parts. There is an outer cup 8 having a radial wall 17. Secured to both sides of the radial wall is the sealing element 7. A garter spring 11 is placed in a groove 16 in the sealing element. An inner cup or cage 10 completes the assembly.

Fig. 2 shows substantially the same structure as shown in Fig. 1 except that instead of securing the sealing member 7 to both sides of a flange on the outer cup, the sealing element is clamped between a washer and the radial wall of the cup.

The other Figures contain minor variations, but fundamentally consist of the same structure.

After describing each of the modifications, the specification points out that by using an oil resisting composition material, which is consistent in texture, only a short shaft contacting surface is required (R. p. 515, col. 1, lines 4-7). This is, of course, to be contrasted with the earlier statement in the patent (R. p. 513, col. 1, lines 29-32) that a leather sealing element requires a large contacting surface.

The patent continues (R. p. 515, col. 1, lines 8-13) by pointing out that a composition such as Duprene is not affected by oil and so the garter spring cannot pull the long axial portion of the seal edge onto the shaft and thereby increase the friction. Again, this is to be contrasted with leather which in an earlier portion of the patent is said to have this disadvantage (R. p. 513, col. 1, lines 22-29).

In thus reading the disclosure, one is lead to believe that Johnson's invention is, as he states it, to combine the good features of the metal-encased seal and of the composition seal. Another way of stating the alleged improvement is the substitution of a composition sealing member, which is uniform in texture and oil-resistant, for the leather sealing member, which is not uniform in texture and which becomes more pliable as it absorbs oil.

On the mere statement of what the alleged improvement was, one recognizes that there could be no invention in substituting a known material, with known properties, for another material with known properties.

“Reading a list and selecting a known compound to meet known requirements is no more ingenious than selecting the last piece to put into the last opening in a jig-saw puzzle. It is not invention.” *Sinclair Co. v. Inter-Chemical Corp.*, 325 U. S. 327, 335 (1945), opinion by Mr. Justice Jackson.*

“Patentees are not entitled to a monopoly for the judicious use of materials the use of which would produce the result to be expected from such selection. Recognition is not invention.” *Kalich et al v. Paterson Pacific Parchment Co.*, 137 F. (2d) 649, 651 (C. C. A. 9, 1943). Opinion by Judge Garrecht.

After repeated rejections, Johnson's application was allowed with a single claim which bears little relation to the

* The relevance of this decision is urged by plaintiff (Appellant's Opening Brief, p. 26).

original objectives. For convenience we break this claim into elements:

An oil seal of the type adopted for insertion to seal the annular space between the shaft and a bore in a housing, comprising

a cup member

having a peripheral portion and an axially inwardly offset radial flange,

a molded resilient sealing member

bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset,

whereby said molded material is protected from wear by contact with adjacent moving parts.

Two things in this claim should be noted particularly. First, the sealing element is not defined as made of "composition material", about which the specification speaks. The claim defines the material only in the phrase "a molded resilient sealing member." This is not limited to a composition material; but will include leather, as Johnson testified (R. p. 102).

The second notable portion of the claim is the final "whereby" clause. This clause had no counterpart in any of the claims of the application. It appeared for the first time in the claim submitted in the final amendment (R. p. 632).

This claim is far from the conception of the specification. The contribution alleged in the specification, of using a composition sealing element in place of leather in a metal cup member, is abandoned. The claim reads on a leather sealing element. The emphasis in the claim is on providing

a rim on the cup which extends beyond the sealing element to protect it from moving parts. This idea—like the original idea of Johnson—is old, as will be shown hereinafter.

The plaintiff alleges two features of the patent in suit (Appellant's Opening Brief, p. 9): "Cold Flow" is said to be prevented, and the sealing member is said to be protected from adjacent moving parts by having the cup member extend beyond it.

Johnson Did Not Solve the "Cold Flow" Problem (Appellant's Opening Brief, pp. 9, 16, 19, 22, 24, 31, 32).

Some synthetic materials differ from natural rubber in exhibiting more of a tendency to take a permanent set when under pressure. The change in shape which may result from pressure is known in the art as "cold flow." The plaintiff argues that Johnson, by cementing the sealing element to the flange of the cup instead of clamping it, produced a seal which "is not subject to cold flow." There is no evidence supporting this assertion. On the contrary the plaintiff represented in its motion to re-open proofs (R. p. 26) that the change in shape of the Johnson seals, exhibits 21 and 22, had been caused by cold flow. A similar representation was made in the affidavit by plaintiff's counsel in support of the motion (R. p. 22). Approximately one-fifth of the testimony in this case is testimony adduced by the plaintiff, itself, on the reopening of proofs in order to prove that the seals made by Johnson had "cold flow" (R. pp. 400-500). Plaintiff's Director of Research, Stewart, proved that the material used in the Johnson seals, plaintiff's exhibits 21 and 22, was subject to so much cold flow that seals made of it could not stay within tolerances for more than a few minutes (R. pp. 494-495). In its Brief in this Court, the plaintiff calls attention to and relies upon the cold flow which took place in the Johnson seals (Appellant's Opening Brief, p. 13).

The "cold flow", as to which there is proof in the record, is a flow resulting from the pressure of the garter spring on the seal. This flow was so marked that even though plaintiff's exhibits 21 and 22 were said to have originally been made to conform to the claim of the patent, by the time they were introduced in evidence the sealing element projected beyond the rim on the cup and the seals did not come within the claim (R. p. 271). When plaintiff speculates about cold flow, plaintiff urges that there would be cold flow at the juncture of the sealing element and the cup, if the sealing element were clamped. There is no proof as to this. Plaintiff asserts that as a result of the cold flow, the seal would become loose. Even if this were so, Johnson did not solve the problem because the sealing element on plaintiff's exhibit 21, made by Johnson, loosened (R. p. 477, See Plfs. Ex. 21).

The plaintiff argues that "the pressure of the clamp is fatal" in the prior Gits seal. The evidence does not support this assertion but, in any event, if it did, Johnson did not improve upon it because Figures 2 and 4 of the Johnson patent show a composition sealing element clamped to the cup. These views are said to be mere modifications of Johnson's idea (R. p. 513, col. 2, lines 30-38). The single claim is not so worded as to exclude clamping and, if this were Johnson's invention, he failed to patent it.

The fact is that cold flow is a property which certain materials exhibit in greater degree than others. Thiokol, the material used by Johnson in his alleged reduction to practice, was particularly subject to cold flow (R. pp. 26, 460-463). Not all synthetic materials have as much cold flow. There was cross-examination of defendant's witness, Gits, as to cold flow (R. pp. 328-333). This seems to show that under certain conditions the material used by Gits, Koroseal, might cold flow, but in the tests of the Gits seals, the sealing member did not become loose and did not leak (R. pp. 338-339).

Appellant has not ever made any Johnson seals commercially. The only Johnson seals known are the samples made in 1935. These samples, as Appellant conclusively proved, were so subject to cold flow that even if originally made to respond to the claim of the Johnson patent, they were soon so warped by so called "cold flow" that they no longer conformed. Also, the sealing member became loosened from the cup member (R. p. 477). Under these circumstances it cannot be said that the District Court was clearly erroneous in failing to find that the Johnson patent solved the "cold flow" problem.

Johnson Made No Contribution in Stating That the Cup Would Protect the Sealing Element from Wear by Contact with Adjacent Moving Parts (Appellant's Opening Brief pp. 8-9).

The claim of the Johnson patent provides that the outer face of the sealing member should lie within the radial plane of the cup bottom "whereby said molded material is protected from wear by contact with adjacent moving parts." This language is relied upon by Appellant as a "feature which contributes to the success of the seal." The fact is that the Johnson seal has not been a success. Appellant excuses itself (Br. p. 4) by stating that it is not "in the field of selling composition seals." Appellant prefers to sell prior art seals made with leather sealing elements clamped in the metal cup with all of the alleged attendant disadvantages under a patent owned by another company, rather than to use its own Johnson patent (R. pp. 82-83, 100-102, 280-282, 522). This preference was so strong that in 1940 and 1941 when building two new large plants, Appellant put in equipment to make the prior art clamped leather seals rather than the Johnson seals here so highly extolled. (R. pp. 88-89).

Appellant argues that the Victor Company has made seals charged here to infringe and that these seals have been successful. It is unnecessary to deny this. What is the proof that the "protection" of the sealing member by the rim of the cup contributed "to the success of the seal"? The proof is all to the contrary. Neither Aukers (R. p. 186-187) nor Gammie (R. pp. 200-201) in all their experience in the industry (which has been continuous throughout the time that the accused seals have been sold) knew of an instance in which a Victor seal was used as a spacer or where any moving part except the shaft would be permitted to contact it. Further than this Aukers pointed out that any contact with a moving part other than the shaft would be ruinous. It would damage the seal and cause failure (R. pp. 187-188). This whereby-clause requiring that the rim of the cup protect the sealing element from wear by contact with adjacent moving parts was added by the final amendment and secured allowance (R. p. 632). In so far as an inwardly offset flange may protect the sealing element, the advantage was already available to the art in a plurality of patents (See, for example, Godley 1,040,308, R. p. 642; Chandler 1,905,800, R. p. 667; Fitzgerald 1,983,746, R. p. 671; Gits 2,052,762, R. p. 701; Heinze 2,071,403, R. p. 707; Winter 2,089,461, R. p. 714; Peterson 2,114,908, R. p. 724; Heinze 2,116,240, R. p. 727) and was not a contribution of Johnson.

The District Court Properly Found that the Gits Patent No. 2,052,762 and the Gits Prior Use Fully Disclosed and Anticipated the Seal of Johnson's Claim (Appellant's Opening Brief pp. 18-19).

Beginning in 1933 Gits worked with the B. F. Goodrich Co. and The Spicer Manufacturing Corp. to develop a sealing member of synthetic material for use with a cup member theretofore used by Gits with a leather sealing member.

Although The Spicer Manufacturing Corp. did not purchase from Gits, but decided to make its own seals, nevertheless, Gits did reduce to practice by April 16, 1934 and filed a patent application on December 17, 1935 which matured into patent No. 2,052,762 on September 1, 1936. In this story there are three separate structures each of which invalidates the Johnson patent. The sale by Gits of such seals using a leather sealing element (R. pp. 308, 544) invalidated because, as Johnson admitted on cross-examination (R. p. 102), a leather sealing element responds to the requirement of the claim that the sealing element be "a molded resilient sealing member." The second invalidating structure is the Gits seal using a synthetic material as a sealing member which was offered for sale on April 16, 1934 (R. pp. 299-300, 544). Both of these structures clearly anticipate the Johnson patent and were prior to any date claimed by him. The third anticipating structure, which is in substance the identical thing, is the patent application, itself, which was filed some months prior to Johnson's application (R. p. 703).

The Gits patent No. 2,052,762 was cited by the Patent Office. Rule 75 of the Patent Office provides that when an application is rejected on a patent "which substantially shows or describes but does not claim" the rejected claim, the applicant can make an affidavit carrying his date back of the prior patent. Johnson filed such an affidavit, alleging reduction to practice prior to the filing of the Gits patent application. Pursuant to this affidavit the Patent Office withdrew the Gits patent as a reference. Although Johnson endeavored to prove his reduction to practice in the instant case, he failed to do so as shown at pp. 21 to 25 hereof. Therefore, the Gits patent as well as the Gits prior use is prior art as to Johnson.

The Appellant (Appellant's Opening Brief pp. 18-19) endeavors to distinguish the Gits patent by reference to the long history of development of the Gits seal which was proved in some detail in this record. It is true that this development work with a synthetic material, which even then was not fully developed, and which was being used in an application such as this for the first time (R. p. 377), was accompanied by some failures. However, the fact that Gits encountered difficulties in his development work is no proof that he did not succeed. A number of samples were made and tested by installation in shock-absorbers where they were subjected to 4,000,000 to 5,600,000 reciprocating strokes and found "okay" (R. pp. 394-395). The seals were offered for sale on April 16, 1934 (R. pp. 299-300, 544). This constituted a statutory bar as it was more than two years prior to Johnson's filing date (R. S. 4886, 35 U. S. C. 31). The Gits seals with leather sealing members were sold by the thousands at least as early as 1933 (R. pp. 308, 544). This, likewise, constituted a statutory bar.

The Appellant argues that the difficulties encountered by Gits were difficulties caused by cold flow. The evidence does not support this assertion. While it is true that Tarbox testified that his company did not order Gits seals because "they were not satisfactory," the only specific objection he made was that, in some of the seals tested, the contact of the sealing member was too far from the lip (R. p. 393). He at no place testified to any leaking at the juncture of the sealing member and the metal cup where Appellant alleges it would occur. He at no time testified as to cold flow. It is also to be recalled that though Tarbox testified that the Gits seals were unsatisfactory, the reason that his company did not finally purchase from Gits was that his company decided to make its own seals to avoid getting mixed up with the Gits patents (R. pp. 379, 579-580).

Appellant's Opening Brief (pp. 18-19) also states that Gits admitted that the reasons his seals failed were that the sealing member was held in place by clamps and due to cold flow the synthetic sealing member loosened up and the seal would leak. The Record, pages 328-333, to which Appellant refers does not support the statement of Appellant. While Gits speculated under cross-examination as to what might happen with cold flow, his testimony as to leaking is unequivocal (R. pp. 338, 339). He there testified that in the tests he made the synthetic rubber member did not loosen. He also unequivocally testified that the seals themselves did not leak.

The complete response of each of the three Gits anticipating structures to the Johnson claim is shown by the chart opposite this page. The Gits seals using the leather sealing member and using the synthetic sealing member were made substantially like the seals shown in the patent (R. pp. 299-300, 307-308). It is respectfully submitted that the finding of fact by the District Court, that the Gits patent and the Gits prior use show all of the substance of the Johnson claim, is correct and that the Appellant has failed to show, as it must on this appeal, that these fact findings are "clearly erroneous."

The District Court Properly Found that the Seal of Johnson's Claim Was Fully Disclosed by the Winter Patent No. 2,089,461, the Fitzgerald Patent No. 1,983,746, the Chandler Patent No. 1,905,800 and the Heinze Patent No. 2,071,403 (Appellant's Opening Brief pp. 14,17, 20).

As shown above the Gits patent and the Gits prior uses each constitutes a clear anticipation of the single claim of the Johnson patent, as the Johnson claim reads verbatim upon those structures. There are a number of other prior art patents upon which the claim of Johnson also reads verbatim except for the single limitation that the sealing

element be secured to "both sides of" the radial flange. These additional prior art patents also anticipate the Johnson claim, since anticipation may be shown by a structure which has the identical or equivalent elements called for by the claim.

The principle that an anticipation may be shown by a structure which has equivalent, though not identical, elements is well illustrated by the decision of this court in *Daily v. Lipman, Wolfe & Co.*, 88 F. (2d) 362 (CCA 9, 1937). In that case, suit was brought upon a patent on a spring wire collar snubber. A prior device was similar and contained all elements of the claim except that the patent there in suit provided points to penetrate the shirt collar, whereas, the prior art device had studs which required previously formed holes in the fabric, such as eyes or button-holes. The Court pointed out that there would be anticipation if the points of the patent in suit performed the same function as the studs of the prior art device and if the points "were well known as a substitute for the studs." The Court then called attention to two patents, each of which disclosed penetrating points and stated that in view of them, the points in the plaintiff's patent were a well-known substitute for the studs. The patent in suit was held anticipated, the Court saying at page 365:

"Plaintiff contends that 'anticipation cannot be made out by constructing an hypothetical combination composed of individual elements selected from several examples of the prior art.' That rule has no application to this case, for our question is simply a question of equivalents."

In each of the patents to which reference will now be made an oil seal is shown upon which the Johnson claim reads verbatim, except for the limitation that the sealing element be secured to "both sides of" the radial flange.

As in the *Daily Case* referred to above, the question presented is one of equivalents. Broadly stated, the question is—what means were known to the art to secure a sealing member to a flange. More specifically, the question is whether clamping the sealing member by metal was the known equivalent of clamping the metal by the sealing member.

Two things are desired in securing the sealing member to the cup member: the two parts must be held together and oil must not be permitted to pass between them.

The art knew that this could be done in several ways:

- (1) By an adhesive (Peterson No. 2,114,908, R. p. 724);
- (2) By molding or vulcanizing the sealing member to the flange, with or without perforations to assist (Penick No. 1,817,095, R. p. 660; Lord No. 1,996,210, R. p. 675; Walker No. 2,028,634, R. p. 745; Miller No. 2,004,669, R. p. 692);
- (3) By clamping (Winter, No. 2,089,461, R. p. 714; Fitzgerald No. 1,983,746, R. p. 671 and others).

Each of these securing means performed the same function in substantially the same way with substantially the same result. Which one or ones might be used in a given instance depended upon the details of design of the particular seal and upon the preferred material of the sealing element. All three securing means were plainly equivalents and known to be such in the art.

In the Johnson patent, itself, one finds a recognition of this equivalency, as Johnson in his disclosure employed all three expedients. Johnson states that it is preferable to use cement to “insure a good bond” (R. p. 514, col. 1, lines 4-7). Johnson advised placing the cup member and the material for the sealing element in the mold and applying pressure to secure the parts (R. p. 514, col. 1, lines 9-11).

Johnson also used clamping (See Figs. 2 and 4, R. p. 512, R. p. 14, col. 1, lines 47-51). In his patent drawings (R. p. 512) Johnson shows in Figs. 1, 3 and 5 devices having a sealing member secured to both sides of a radial flange. In Figs. 2 and 4 Johnson shows the sealing member clamped between a washer and a flange on the cup. In the Specification (R. p. 514, col. 1, lines 54-58) Johnson states that the washer with the sealing element secured to one side of it may be used alone. The Johnson patent, itself, has termed these different expedients merely modified forms of the same thing (R. p. 513, col. 2, lines 30-38, R. p. 515, col. 1, line 18 to col. 2, line 1). As was so aptly stated in *Warner Bros. Company v. American Lady Corset Company*, 136 F. (2d) 93, 95 (1943) by the Circuit Court of Appeals for the Second Circuit:

“Having treated both forms of construction as equivalents, it would seem that anticipation of one would equally anticipate the other.”

Since the art and the Johnson patent, itself, treated cementing, molding, vulcanizing and clamping the sealing element to the cup as equivalents, they were properly so regarded by the District Court.

The complete and literal response of each of the four patents (Winter, Fitzgerald, Chandler and Heinze) to the Johnson claim, save for the manner of securing the sealing element to the cup, appears not to be denied. Johnson on the witness stand conceded this as to Chandler, Winter and Fitzgerald (R. pp. 247-248).

As to each of these patents, the Appellant (Brief pp. 16-17, 20) seeks to distinguish only on the ground that clamping the sealing element will cause cold flow and destroy the usefulness of the seal. This has been discussed hereinbefore. There is no proof and merely the speculation of Appellant as to it. The only devices shown by this record

to have been adversely affected by cold flow were the Johnson seals, plaintiff's exhibits 21 and 22.

Appellant (Brief, p. 17) states that the Chandler patent was cited against the Johnson application "and its irrelevancy established." An examination of the file wrapper and contents (R. p. 593 to 639) justifies appellant's statement that the Chandler patent was cited against the Johnson application. However, the file wrapper does not show that the alleged "irrelevancy" of the Chandler patent "was established." At R. p. 613 to which Appellant refers, Johnson's solicitor in April, 1937 argued that Gits and Chandler were not relevant because the sealing member is secured by means of clamping. This did not establish any alleged irrelevancy for on August 2, 1937 the Patent Office Examiner again rejected on the same references, the Examiner saying R. pp. 616-617:

"The vulcanized connection of Penick et al. and the clamped connection of Gits and Chandler, are both forms of a joining or bonding means, and the substitution of one for the other is held not to amount to invention."

At Record p. 627 to which Appellant also refers as authority for its assertion that the irrelevancy of the Chandler patent was established in the Patent Office, Johnson's solicitor again sought to distinguish the Chandler patent, but this did not establish its irrelevancy, for a few months later the Patent Office Examiner again rejected all claims on the patents to Chandler, Penick and Gits (R. p. 631). Johnson's solicitor responded with the final amendment by which all claims were cancelled and the final claim added. This amendment shows that there was "an interview kindly granted by the Examiner" (R. p. 633). Patent Office Rule 68 provides that where there has been an interview, the applicant "must file a written statement of the reasons presented at the interview as warranting favorable action."

Presumably, the rule was followed by Johnson's solicitor. In the remarks accompanying the final amendment attention is directed to affidavits under Rule 75 to overcome the reference to the Gits patent (R. p. 633). Nothing is said as to the Chandler patent. Thus, the file wrapper and contents of the Johnson patent not only do not support Appellant's assertion that the irrelevancy of the Chandler patent was established but, on the contrary, show Johnson never successfully distinguished the Chandler patent and was allowed the single claim only because at the interview and at the time of the final amendment, the Chandler patent was not mentioned.

The Accused Seals Do Not Come Within the Johnson Claim and, in Any Event, Were Prior to Johnson so that His Claim Cannot Be at the Same Time Valid and Infringed (Appellant's Opening Brief pp. 9-13).

The final clause of the Johnson claim reads:

“a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.”

Appellant offered no proof that any accused seal was ever so used that this result was obtained. Appellant had the burden of proof on this, first, because in any case the plaintiff must show not only a literal response to a claim, but also that the accused structure functions like the claimed structure and accomplishes the same result. Moreover, where a claim specifies a manner of operation, the plaintiff must prove that it is performed.

In *Thompson Meter Co. v. National Meter Co.*, 106 F. 519 (CC, NY, 1900) the Court held a claim not infringed

which called for a combination of water meter parts and concluded "whereby the impact of the inflowing current upon the disk is decreased, substantially as set forth." The alleged infringer manufactured the claimed combination of elements but did not use the parts in the manner recited in the whereby clause. The Court held that infringement was absent (R. p. 530), "because as a matter of law it is settled that such a specific statement of function thus inserted into a claim as material cannot be disregarded." See also

E. H. Freeman Electric Co. v. Weber Electric Co.,
262 F. 769 (CCA 3, 1919), affirmed 256 U. S.
668, 65 L. Ed. 1162;

Lovell v. Johnson, 91 F. 160 (CCA 1, 1898)

Not only did the plaintiff fail to prove that any accused device functioned as called for by the claim, but plaintiff also failed to prove that any accused device could so function. The testimony of Aukers (R. pp. 186-188) and Gammie (R. pp. 200-201) showed that in all of their experience neither knew of an instance in which an accused seal was used as a spacer or was used where any moving part except the shaft would be permitted to contact it. Aukers further testified (R. pp. 187-188) that any contact with moving parts other than the shaft would so damage one of the accused seals that it would result in failure of the seal. The thin metal cup is ordinarily from 0.03 to 0.05 inches in thickness. (See Plf. Ex. 21 and 22 for example.) For this reason, and others, the defendant contested infringement in the Court below. The District Court did not pass upon the question. It is submitted that in view of plaintiff's failure of proof, infringement was not established. In any event, since the accused seals were offered for sale prior to Johnson's application (R. pp.

189-195, 768-770), the Johnson patent cannot at the same time be valid over, and infringed by, the accused structure.

At the trial the plaintiff endeavored to prove a reduction to practice in the fall of 1935. Johnson produced two seals, plaintiff's exhibits 21 and 22, which he testified were made at that time. On cross-examination Johnson testified that neither of these seals came within the claim of the patent (R. p. 271). Appellant closed its case without offering any explanation. The testimony was given in the District Court in January, 1946. Appellant waited until May, after Appellee's Brief in the Court below was on file, and then made a motion to reopen the proofs in order to show that plaintiff's exhibits 21 and 22 were not at the time of trial of the same shape as when made (R. p. 25).

Appellant's effort to mend its hold by reopening of proofs failed. The burden of proof is on the party seeking to carry back his date and the burden is a heavy one.

Clark Thread Co. v. Willimantic Linen Co., 140
U. S. 481, 492, 35 L. Ed. 521 (1890)

The Appellant undertook the burden of proving that in 1935 it made and successfully tested seals covered by the claim of the Johnson patent. Johnson produced the two seals (R. p. 235, 236). Even when his attention was called to the fact that these seals did not respond to the claim of the Johnson patent (R. p. 271), he did not testify that as originally made the seals did respond. He had testified that other samples were made in 1935 and that "they were all just the same as" plaintiff's exhibits 21 and 22 (R. p. 267). On the reopening of proofs, Johnson was not called. The only witness called to testify about the original shape of the exhibits on the reopening of proofs was Klein. Klein testified from memory that in making the seals some eleven years earlier, he had buffed them after they came out

of the mold so as to bring the back side of the sealing element within the cup (R. p. 405). Klein testified that there had been a change in shape due to "aging and cold flow" (R. p. 405). His opinion on this was shown on cross-examination to be of little value. For example, when asked as to how fast the Thiokol of the sealing element would change shape and how much change would take place in three years, Klein testified (R. p. 435) "I cannot answer that one. You will have to ask our chemist about that." When Stewart, a chemist and Appellant's Director of Research, was later asked about this, he testified (R. p. 483)—"I am not qualified to say. I could not estimate at all."

Plaintiff did not meet its burden of proof in showing that any seal made in 1935 embodied the Johnson claim. The only seals extant, plaintiff's exhibits 21 and 22, did not come within the claim. Of all of those who would have had knowledge of the shape of those seals in 1935, only Klein was called to testify.

Another defect in plaintiff's endeavor to prove a reduction to practice in 1935 is plaintiff's failure to show that it tested any seal so as to prove that it would perform its intended function under actual service conditions by concrete, visible, contemporaneous proofs which speak for themselves.

See *Emerson & Morris Co. v. Simpson Bros. Corp.*,
202 Fed. 747, 750 (C. C. A. 1, 1913) cert. den. 235
U. S. 707.

In addition to proof that a device coming within the claim of the patent was made, one seeking to show a reduction to practice must prove that it performed its intended function under actual service conditions. Depending upon what the device is, such tests may or may not be

performed in the laboratory. There are many decisions by all federal courts on this point. We quote two of the best statements of the rule. In *Chittick v. Lyons* 104 F. (2d) 818, 820 (Court of Customs and Pat. App. 1939) the Court (Opinion by Judge Garrett) said:

“That laboratory tests may constitute reduction to practice, under some circumstances, is so well settled that citation of authorities upon that point is deemed unnecessary. Such tests, however, must simulate actual service conditions with sufficient clearness to render it reasonably certain that the subject matter will perform its intended function in actual service.”

In *Henderson v. Gilpin* (C. D. 1913, 310; 187 O. G. 231; 39 App. D. C. 428) the Court said:

“It is not enough, as contended by appellant, that these shop tests indicated that the operation of the device would be successful. To constitute reduction to practice the test must amount to a demonstration in fact, as contradistinguished from one in theory.”

The application of these principles to an oil seal is illustrated in *Chicago Rawhide Mfg. Co. v. National Motor Bearing Co.*, 50 F. Supp. 458 (D. C., N. D. Cal. S. D., 1943). That was a suit brought by Chicago Rawhide after an interference was terminated favorable to National Motor Bearing. The plaintiff urged that it had reduced to practice prior to the defendant, and the defendant argued that the plaintiff's alleged reduction to practice was not sufficient because the test was inadequate. The Court called attention to the fact that the plaintiff (as the plaintiff herein) relied upon witness recollections without records of the test. The Court in its opinion described the tests in some detail. They were more thorough than Johnson's appear to have been. The Court held them insufficient, saying at page 461:

“Plaintiff’s invention is an essential structural element of a general utility oil seal. Oil seals are used on moving shafts to keep the lubricant in and foreign matter out. In order to do this the sealing lip must fit tight against the shaft at all speeds and under the stresses and strains that it is normally subjected to. Failure to do so might have disastrous consequences. Witnesses testified that because the seals are such vital parts of the mechanisms in which they are used, no user would buy a new type without testing it under actual working conditions. It seems clear, therefore, that a test that falls short of imposing on the seal the strains and stresses it would encounter in actual operation is insufficient to constitute reduction to practice.”

The tests alleged to have been performed by Johnson are defective in several respects, but primarily in failing to demonstrate that the rim of the cup would protect the molded material of the sealing element from wear by contact with adjacent moving parts. Klein admitted that in the test there was no adjacent moving part. (R. p. 423). Since the claim specifically calls for this function to be performed by the cup bottom, whatever else a reduction to practice might require, the test should determine that the seal would function in this manner. This is particularly true in view of Aukers testimony at the trial that any contact of the thin metal of the cup with adjacent moving parts would result in immediate or more rapid failure of the seal (R. pp. 186-188).

Moreover, Appellant did not establish with the required certainty what was done in the inadequate tests. Johnson and Klein both agreed that exhibit 21 was tested and exhibit 22 was not (R. pp. 235-236, 424). How long did the test of Exhibit 21 continue? Johnson said 72 hours (R. p. 267). Klein said “a little over a month.” (R. pp. 402, 423). In addition to this, whatever proofs the Appellant might have produced as other tests in 1935, no reduction to practice could be established since plaintiff’s Director of Research,

Stewart, testified that in his opinion the Thiokol material used by Johnson in the alleged reduction to practice was not operable at all in an oil seal (R. p. 473). Stewart further testified that in view of the cold flow of this material, it could not possibly stay within the tolerances set (R. p. 494-495) and that even the improved forms of Thiokol, which are known today, are not operable in oil seals, and the form known in 1935 was much worse (R. pp. 495-496).

Appellant wholly failed to prove a reduction to practice of the structure of the claim of the Johnson patent in 1935. The earliest date to which Johnson is entitled is the filing date of the application, August 5, 1936. Even this date might properly be contested since this claim, adding for the first time the whereby clause, was added in the last amendment on November 18, 1938 (R. p. 632). The accused seals were offered for sale and some of the Type A seals were actually sold in July, 1936 (R. pp. 189-195, 768-770). They are, therefore, part of the prior art so far as the Johnson patent is concerned. Under these circumstances whatever view be taken as to infringement, there cannot be a finding of both validity and infringement.

The District Court Properly Found that the Johnson Patent Required Nothing More than Ordinary Mechanical and Engineering Skill and Was Lacking in Patentable Novelty and Invention (Appellant's Opening Brief pp. 23-28).

The finding by the District Court (R. p. 58) that the structure of Johnson required nothing more than ordinary mechanical and engineering skill and was lacking in invention is a finding of fact.

Williams Manufacturing Co. v. United Shoe Machinery Co., 316 U. S. 364, 367, 86 L. Ed. 1537 (1942);

Crowell v. Baker Oil Tools, Inc., 153 Fed. (2nd) 972 (CCA 9, 1946)

The finding is amply supported by the evidence and is not clearly erroneous.

The Appellant (Opening Brief pp. 23 to 25) alleges seven "facts" which are said to be "established." It is significant that none of these alleged "facts" were found to be such by the District Court. Further, none bear any relation to the Johnson patent claim and its functional "whereby" clause.

The first of the "facts" alleged by Appellant is that the structure of the Johnson oil seal was new with Johnson. The District Court found the contrary. (R. pp. 57-59). At pp. 8 to 25 hereof, we have shown that the evidence fully supports the District Court's finding.

The second assertion of alleged "fact" by Appellant (Br. p. 23) is that the accused seals "are substantial Chinese copies" of Figs. 1 and 5 of the Johnson patent. Since it is the claim of a patent which controls (*Universal Oil Prod. Co. v. Globe Oil & Ref. Co.*, 322 U. S. 471, 484, 88, L. Ed. 1399, 1407), there is no relevance in this assertion even if it were true. However, the record shows that the accused seals were on sale in July, 1936 (R. pp. 189-195, 768-770), and Figs. 1 and 5 of the Johnson patent are not shown to have been in existence prior to the filing of the patent application in August, 1936. Thus, the alleged *copies* were on sale and were part of the *public knowledge prior* to the time that the alleged *originals* existed, even in the secret files of the Patent Office. So far as the claim of the patent is concerned, it came into existence some two years later by amendment in November, 1938. By this time the accused seals had been advertised and sold and Johnson had knowledge of them (R. pp. 271-272).

The third "fact" alleged by the Appellant (Br. p. 23) is that the practical value of Johnson's invention is established by the commercial success of Victor seals alleged

to be copies, even though plaintiff "for its own good reasons" never sold any Johnson seals. In this connection, Appellant refers to the case of *Smokador Manufacturing Co. v. Tubular Products Co.*, 31 F. (2d) 255 (CCA 2, 1929) in which the Court, in its opinion by Judge Augustus Hand, stated that on the facts there involved, sales by the defendant were a tribute to the value of the invention, even though the plaintiff had not manufactured and sold under its patent. On the facts of that case, a tribute by the defendant might properly be inferred, but the facts are quite different from the instant case. The defendant in that case was an admitted infringer who had bribed an employee of the plaintiff to get the design of the plaintiff's ash stand, and promptly copied. The facts in the instant case are quite different. Here the accused seals were on sale before Johnson's patent application was filed, and were designed independently. *Johnson had knowledge of the accused seals before he submitted his final claim to the Patent Office* (R. p. 272). If copying exists in the case at bar, it is in reverse. Furthermore, while the Appellant lightly casts aside its own failure to use the patent "for its own good reasons," on the question of invention it is interesting to see what those "good reasons" were. The record shows that the Appellant, claimed by Johnson to be the second largest company in the field, and the Chicago Rawhide Company, claimed by Johnson to be the largest producer of oil seals (R. p. 290), manufactured under another patent (R. p. 281). The Appellant uses clamping. The explanation of non-use by Johnson was that from 1935 until 1939 the patent had not issued (R. p. 82). After the patent issued, Johnson testified that the Appellant did not make the Johnson seals because Victor was making them (R. p. 71). Even in 1940 and 1941, when building two new large plants, the Appellant put in machinery to make seals under a Chicago Rawhide patent rather than to put in machinery

to make seals under its own patent (R. pp. 70, 88-89, 281). The fact that the Appellant continued to make prior art seals and did not consider the structure of the Johnson patent of sufficient merit to warrant a change in equipment, and the fact that, even when building two new plants, the Appellant preferred to continue manufacture under another company's patent rather than to use its own, do not indicate that Johnson made a contribution to the art. The fact that the Victor company has made substantial sales of the accused seals indicates that they are good products, but does not show that their merit is in any way connected with the Johnson patent.

The fourth "fact" alleged by Appellant (Br. p. 24) is that Johnson seals have a new mode of operation in that the flexible sealing member is not under compression as held in the cup member and, therefore, is not subject to cold flow. This subject has been fully discussed hereinbefore (pp. 8 to 10). An oil seal will or will not be subject to cold flow depending upon the material of which the sealing element is made. Johnson neither discovered nor received a claim on this. If there was any invention in cementing or molding instead of clamping, this was made prior to Johnson. As pointed out at page 16 of this brief, the Johnson patent shows the equivalency of clamping the sealing element between two layers of metal and "clamping" a layer of metal between two portions of the sealing element.

The fifth "fact" alleged by Appellant (Br. p. 24) is that Johnson was the first to maintain a rubber or rubber-like sealing member in permanent, fixed, leak-tight engagement in the cup and to fix the sealing lip in correct position on the shaft and in relation to the cup. This assertion is without support in the record. Johnson made some sample seals in 1935, only two of which were preserved, neither of which was tested in contact with an adjacent moving part

as required by the claim, only one of which was tested at all—and it for an unknown period—and both of which had sealing elements made of a material admitted by Appellant's Director of Research to be inoperable in an oil seal. Johnson contributed nothing. Both Gits and Victor had oil seals on sale with synthetic sealing members prior to Johnson's patent application. Johnson's patent application left the oil seal art as it found it—save for the contribution of some misinformation as to the protection of the sealing element from wear by contact with adjacent moving parts. Even this misinformation was based upon a structural feature old in many patents. (See page 11 hereof.) Johnson's patent joined the thousand or more unused ones in the art (R. p. 241). If the Johnson patent structure had the merit attributed to it by Appellant, it should have displaced the prior art clamping—at least in Appellant's manufacture (R. p. 281). Appellant's non-use of the Johnson patent is inconsistent with its eulogy in this case.

As a sixth "fact", Appellant alleges that there was a recognized demand, that the art struggled for years, and the struggle resulted only in failure for want of Johnson's conception. The record fails to support this assertion. It is true that as the synthetic materials became available in the early 1930's, in not yet developed form, those seeking to employ them had some difficulties in adaptation. Gits, in 1933 for example, the first to endeavor to employ Koroseal in such an application, required considerable experimentation. It is also true that Johnson had difficulty with the synthetic material and ended up using Thiokol, which Appellant's Director of Research admitted is inoperable (R. p. 473). But the struggles of the prior art were not in vain and to this day, so far as the record shows, the two largest manufacturers, including Appellant, make the prior art leather seals under a prior art patent. There are at

least five "good-sized" companies making oil seals who have found no use for the Johnson patent (R. p. 289-290).

The seventh "fact" alleged by Appellant is that the Victor company took out some improvement patents and, therefore, it comes with bad grace for the Victor company to contend that the Johnson seal lacks patentability (Appellant's Opening Brief pp. 24-25). However, this does not mean that the Victor Company seals come within the Johnson claim or that the Johnson claim is valid.

On pp. 26 and 27 of its Brief, the Appellant quotes short excerpts from four decisions of the Supreme Court. None of these decisions is on facts approximating those in the case at bar. In *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 U. S. 45, 67 L. Ed. 523 (1923) the Court, in its opinion by Mr. Chief Justice Taft, called attention to the evidence which showed that Eibel had "advanced the art substantially." Among other things the evidence in that case showed that the patent there involved increased production by at least 20%. Over two-thirds of the industry were licensees under the patent and most of the remainder of the industry were infringers contributing to a defense fund to resist suits under the Eibel patent. In the instant case, the facts are far different. By the testimony of Johnson, there are seven companies in this country making oil seals of the general type here involved (R. p. 289). Of these, only the Victor Company is alleged to be using the Johnson invention. It does not use the Johnson structure and the Appellant prefers to manufacture under another patent owned by another company.

In the *Barbed Wire Case*, 143 U. S. 275, 36 L. Ed. 154 (1892), the Supreme Court, in its opinion by Mr. Justice Brown, a few sentences prior to the statement quoted by Appellant (Br. p. 26), called attention to the fact that the sales under the prior art patent closest to the Glidden patent there in suit never exceeded 3000 tons per year and

that the sales under the Glidden patent had reached 173,000 tons per year. The court pointed out the fact of common knowledge that the barbed wire fence of the patent in suit had enabled the fencing of a very large portion of the Western plains which otherwise would have had to be unfenced. No such showing was made by the Johnson patent here in suit.

In *Diamond Rubber Co. v. Consolidated Tire Company*, 220 U. S. 428, 55 L. Ed. 527 (1911), the Supreme Court, in its opinion by Mr. Justice McKenna, pointed out that the patented tire there involved had secured "almost universal acceptance." Far from universal acceptance, the Johnson patent significantly is not used even by its owner, the Appellant.

In *Sinclair & Carroll Co., Inc. v. Interchemical Co.*, 325 U. S. 327, 89 L. Ed. 1644 (1945), from which the Appellant quotes at page 26 of its Brief, the Supreme Court held invalid claims on a printer's ink. The Supreme Court pointed out that many efforts were made to eliminate the necessity of a delay of from one to 24 hours after printing one side of a sheet of paper before printing the reverse side. The Court pointed out that the problem was complicated. The Court further pointed out that since the disclosure by the patentee, his ink or similar infringing inks had been used to print *The Saturday Evening Post*, *Colliers* and *The New Yorker*. However, the Supreme Court held that the patentee had not made an invention. The Court said in its opinion by Mr. Justice Jackson at p. 327:

"Reading a list and selecting a known compound to meet known requirements is no more ingenious than selecting the last piece to put into the last opening in a jig-saw puzzle. It is not invention."

This case to which Appellant has directed attention presented a strong record for validity. It was well established that a real problem existed and it was well established that

the patentee solved the problem. It was also well established that the patented improvement was immediately adopted by substantial companies in the industry. Even then the Supreme Court held the patent invalid because the elements which had been combined by the patentee were all elements with known qualities, combined to produce a result that could have been predicted. In the case at bar, there is no proof whatsoever that the patent in suit solved any problem. Indeed, the testimony shows that the structure of the Johnson *claim* is valueless.

It has been shown hereinbefore (pp. 11 to 25) that the Johnson claim is anticipated by a plurality of prior art seals. However, assuming for the sake of argument that what Appellant here asserts is true and that Johnson did overcome problems of cold flow by molding the sealing element to the cup member rather than by clamping it, there would still be no invention. Prior to Johnson it was known that a sealing element could be molded to a metal flange (See, for example, Penick Patent No. 1,817,095, R. p. 660). If using a synthetic material which would cold flow, instead of leather used by Winter No. 2,089,461 (R. p. 714), for example, the man skilled in the art could substitute the known method of securing of Penick for the clamp shown by Winter. If the oil seal manufacturer desires to mold and vulcanize in his own plant, he can do so after the synthetic material is in contact with the flange as Johnson suggests and as earlier suggested by Penick. If the oil seal manufacturer desires to purchase the synthetic sealing elements already vulcanized by the source of supply, he can do so as Gits did. There is no invention involved in doing it one way instead of the other. "The choice was one between alternative means obvious to any mechanic; it did not have the quality of invention."¹

¹ *Essex Razor Blade Corp. v. Gillette Safety Razor Co.*, 299 U. S. 94, 98, 81 L. Ed. 60 (1936).

There are numerous illustrations of this principle in the decided cases. Each decision, of course, turned upon the facts of the particular case. Since the question of invention is a question of fact, no "authority" can be cited to sustain a fact finding. However, to indicate that the District Court herein in finding no invention was consistent with previous decisions of this Court and the Supreme Court, we call attention to the following cases:

Grayson Heat Control v. Los Angeles Gas Appliance Co., Inc., 134 F. (2d) 478, 481 (1943);

Magarian v. Detroit Products Co., 128 F. (2d) 544 (C. C. A. 9, 1942).

Mantle Lamp Co. v. Aluminum Products Co., 301 U. S. 544, 547, 81 L. Ed. 1277 (1937).

The District Court Properly Found that the Appellant Was Guilty of Laches (Appellant's Opening Brief pp. 28-31).

The Appellant is correct in calling attention to the typographical error in Finding VIII (R. p. 58). The accused structures admittedly were on sale beginning in July, 1936 and not 1935. The exact date when the sale of the accused devices began is not of significance so far as the question of laches is concerned. The patent issued in 1939. The Appellant admittedly had knowledge of the accused devices prior to the issuance of the patent. In the same month in which the patent issued, the Appellant purchased accused seals from the defendant. Neither at that time nor thereafter did plaintiff make any charge of infringement to defendant until the complaint was filed on September 18, 1944. This delay of five and one-half years to even notify the defendant of infringement when defendant was selling a product which had been on the market for several years prior to the issuance of the patent constituted laches.

The Appellant seeks to justify the delay by asserting that it endeavored to settle with the Victor Company and did not give up hope of settlement until 1940 (Appellant's Opening Brief p. 28). These negotiations were proved by defendant's witness, Gammie, whose testimony was based upon a memorandum made at the time (R. pp. 203-206). The Victor Company suggested that the patent in suit might have nuisance value of \$1500 or \$2000 and Johnson countered by quoting such sums as "chicken feed." Johnson thought the patent was worth \$10,000 (R. p. 204). Johnson said he would prefer to keep the patent "for trading purposes later on." That constituted the negotiations. Neither then nor when Johnson said he gave up hope of settlement in 1940 (R. p. 74) did Appellant charge Appellee with infringement.

At p. 29 of its Brief, the Appellant seeks to justify this delay because of the war. It is not denied that patent litigation might properly be postponed to further the progress of the war; however, the war effort would not have been impaired by the sending of a notice of infringement to the defendant. Further it should be noted that in September, 1944, when the complaint was filed herein, this country was still at war both in Europe and in the Pacific.

The finding of laches by the District Court, though clearly supported by the evidence, was not needed to compel the dismissal of plaintiff's complaint, since the findings as to anticipation and lack of invention required this.

The Johnson Patent Is Invalid Because Issued to Johnson Alone When, at best, It Is a Joint Invention of Johnson and Klein.

Appellant's witness, Klein, testified that he made the sketch, Exhibit 20, from his own imagination (R. p. 417). He later testified that he did this work in collaboration

with Johnson and that they did it together (R. p. 418). On redirect examination he testified that his contribution was the bonding of the sealing element to the case to make a two-piece oil seal out of it (R. p. 441). Again, at record p. 443, Klein testified that the outer case was suggested by Johnson and the bonding of the material to the case was suggested by Klein. Finally, at R. pp. 442-443, Klein testified:

“Q. Counsel for plaintiff asked you regarding certain elements. Now, I wish you would tell us without the patent claim before you what elements you presented and what elements Mr. Johnson presented? Just tell us.

A. We were working on the development of the simplest possible type of synthetic oil seal with the least possible number of parts and the lowest possible manufacturing cost.

In connection with that the outer case was suggested by Mr. Johnson *and the bonding of the material to the case was presented by myself* and illustrated in this sketch, Exhibit 20. (Italics supplied.)

In addition to the contouring of the seal I sketched a cross-section, a small portion of the cross-section of the mold, pointing out the advantages of such a seal and showing how it could be molded. That just about covers it.”

It is submitted that Appellee's position hereinbefore taken, that there is no novelty and no invention in the Johnson patent is sound; but if there were any element contributed in molding the synthetic material to the cup, it came from Klein and not from Johnson. Even if Johnson rose to the stature of co-inventor by his suggestion of the outer case (which was old), the patent is void.

Tin Decorating Co. v. Metal Package Corp., 37 F. (2d) 5, 7 (C.C.A. 2, 1930) cert. den. 281 U. S. 759.

CONCLUSION.

The Johnson patent in suit is clearly void for lack of novelty and for lack of invention over the prior art. It is invalid on the prior use by Gits. It made no contribution to the art. It has never been used—even by the plaintiff, who prefers to make oil seals under a patent licensed to it by another manufacturer of oil seals.

It is very limited in its scope by the requirement that the molded material be protected by the cup bottom from wear by contact with adjacent moving parts. This element is not found in defendant's device. For this reason alone there is no infringement. Further, the defendant's device was on the market before the Johnson application for patent was filed, and it was not proved that Johnson made his alleged invention prior to his filing. For this reason also there can be no infringement, even if a false postulate of validity is made.

The District Court's findings are overwhelmingly supported by the evidence. Further, the plaintiff itself proved that Johnson is not the inventor of the patent's claim. It is submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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No. 11,631

United States
Circuit Court of Appeals

For the Ninth Circuit

NATIONAL MOTOR BEARING CO., INC., A CORPORATION,
APPELLANT-PLAINTIFF,

v.

CHANSLOR & LYON CO., A CORPORATION,
APPELLEE-DEFENDANT.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The following are the principal points relied on in Appellee's Brief in the order of their apparent importance as stressed in that brief:

1. That plaintiff had not commercialized Johnson's invention.
2. That Victor's accused seals were "on sale" and actually sold before Johnson filed his application.
3. That Johnson does not antedate the alleged sale of the Victor seals.
4. That defendant's Victor seals in issue do not infringe.

5. That this Court should not disturb the Findings of Fact of the District Court as to anticipation and lack of invention based on the five patents: Chandler, Fitzgerald, Gits, Heinze 2,071,403 and Winter.

6. That Johnson did not solve the "cold flow" problem.

7. That Gits and his patent No. 2,052,762 anticipate as well as the others named above.

8. That five other patents, making in all ten patents, should be considered on the questions of anticipation and of invention.

9. That Klein was the inventor, or at least a joint inventor with Johnson.

10. That plaintiff is barred by laches.

None of these ten points has any merit or constitutes a valid defense as we shall show.

I. Non-User by Plaintiff Should Not Defeat the Patent.

Although this point is not specifically relied on as in itself a defense, it is urged throughout the Appellee's brief as a reason for holding the Johnson patent in suit invalid or not infringed or not entitled to be enforced by the Courts.

That a valid patent is not to be denied enforcement by the Courts has been a fundamental principle in our patent system. *Paper Bag Patent Case*, 210 U.S. 405, 422-430, and many other cases to the same effect.

In fact, it would wreck our patent system if Courts should deny enforcement to patents which their owners had not put into commercial practice. **There is no such provision in the statutes or in the authorities.**

If a patent were denied enforcement on this ground, a great number of applications for patents would not be

filed and a great many patents would not be issued, but would be kept as trade secrets thereby defeating the very object of our patent system, which is to encourage inventors to disclose to the public their new ideas for which in return they receive a monopoly, namely the right to exclude others for the term of 17 years. *Bloomer v. McQuewan*, 14 How. 539.

The non-user as yet by the plaintiff of Johnson's invention is therefore no ground for refusing the relief herein asked for or for creating a prejudice against the patent designed to obscure and even obliterate the significant differences between the patent and the prior art, which differences are common both to the patent and to the defendant's Victor seals.

Non-user of a plaintiff's patent is pertinent only when the practicability of the patented thing is in doubt. Here this is not the case. No such attack is made on the patent. The success of the accused Victor seals, being close copies of the seals of the Johnson patent, is a conclusive answer to such an attack.

The Victor Co. has no reason to complain because the plaintiff did not choose to enter the market in competition with Victor to the injury of Victor's business in the infringing seals.

II. No Victor Type A or H Seals Were in Existence Before Johnson's Filing Date, August 5, 1936.

Appellee's Brief, pp. 19-25, lays great stress on the assertion typified by the statement at p. 25: "The accused seals were offered for sale and some of the Type A seals were actually sold in July 1936 (R. pp. 189-195, 768-770)". The same statement in different forms is reiterated through the brief.

It is not true. None of the accused types of seals were in existence in July 1936 and therefore none were offered for sale and none were sold in that month.

The only testimony as to Victor's sales is given by Aukers, Victor's development and production engineer. There was no testimony on this point by Gammie, Victor's sales manager, who followed Aukers to the stand (p. 199). There was no contemporaneous record evidence except the Quotation and Selling Records (pp. 768-769) and a Bulletin gotten out for salesmen (p. 770).

The Quotation and Selling Records show that Type A seals in quantities of 25 to 500 were quoted to the Spicer Co. on June 30, 1936 and an order for 25 was received July 9, 1936. But **there is no record of their manufacture or delivery. There is no testimony whatever when these Type A seals were manufactured or delivered or that they were ever made and delivered.** As the burden is heavily on the Appellee to show the facts of alleged anticipation, the absence of any proof of manufacture or delivery, which could easily have been produced, if it existed, as by Gammie for example, may be taken as showing that there was none, or at least that the dates of manufacture and delivery were after August 5, 1936, Johnson's filing date.

The Quotation and Selling Records also show that 50 Type H seals were ordered by the Richard Wilcox Manufacturing Co. on November 30, 1936. As this is later than Johnson's date of August 5, 1936, this transaction is wholly immaterial. But even as to these seals, there is no record of delivery and Aukers testified that he did not know when they were delivered (p. 191).

The Bulletin Defendant's Exhibit AAH (p. 770) shows the "Standard Constructions of Victor Synthetic Seals." It is marked on the bottom "supersedes all prints prior to July 29, 1936." Even accepting that statement, it is no

record proof of the date of this bulletin but only that it was produced some time after July 29, 1936. Aukers merely says the bulletins were given out to salesmen and some good customers "at that time" (p. 194). But this is merely his recollection without any record to back it up and is too vague to prove the date. Aukers testified that this bulletin shows **"the types of seals as designed"** (p. 190). **He did not say as made or ready for delivery.** Auker's testimony that the second sheet of the bulletin gives "the type of the seals available at that time for which tools were made" means only that the tools were ready to make the seals if ordered. It does not prove that the seals had been manufactured. For instance, the seals ordered by the Wilcox Co. had the number SDM-191 on page 2 of the bulletin, but were not ordered until November 30, 1936 (p. 191).

The quotations to Spicer and Wilcox were merely offers to make the seals if the customer would order them.

Aukers testified that in June of 1936 the Victor Co. made the tools for making Type A, and that in the middle of July, 1936, it completed the tools for the Type H (p. 191). He does not say that any seals were made at that time.

He also said that in 1936 he had "the job of testing all the oil seals as made from all the tools." He says that the tests were "all made before he made any sales" (p. 192), but there is no corroboration of this. There is nothing to show what the tests were, or how they were made, or whether they were successful or not, or when the tests were made and completed.

There is no evidence of who made the invention embodied in either of the Victor Type A or Type H seals.

There is no evidence that any such Victor seals were in existence or on sale by the Victor Co. before August 5, 1936.

The conclusion is inevitable that the Victor Type A and Type H seals were not sold or "on sale" prior to Johnson's filing date. *B. F. Sturtevant Co. v. Massachusetts Hair & Felt Co.*, 124 F.(2) 95, 97 (1941) (C.C.A. 1); *Trabon Engineering Corp. v. Dirkes*, 136 F.(2) 24, 28 (1943) (C.C.A. 6); *M'Creery Engineering Co. v. Massachusetts Fan Co.*, 195 Fed. 498, 500, 501 (1912) (C.C.A. 1); *Burke Electric Co. v. Independent Pneumatic Tool Co.*, 234 Fed. 93 (1916) (C.C.A. 2); *Walker on Patents* (Deller Ed.) Vol. 1, p. 355.

Johnson's filing date of August 5, 1936 stands as the date of his constructive reduction to practice and is ahead of any proven date of the manufacture, much less the sale, of either of the Type A or the Type H Victor seals here in issue. **Therefore Appellee's entire defense structure, based on the alleged selling of the Victor types A and H seals prior to Johnson's filing date, is shown on Appellee's own testimony to be absolutely without foundation.**

III. Johnson's Dates Are Earlier Than Any Dates Which Can Be Ascribed to the Victor Type Seals in Issue.

To summarize:

The sketch Exhibit 20 (p. 532), is dated May 23, 1935.

The assembly drawing, Exhibit 23 (p. 533), is dated August 13, 1935.

A seal, Exhibit 21, made from this drawing and known as "Metal Heel Hermetik," was adequately tested from September 9 to October 7, 1935 (pp. 235, 401). On the back of the tag on the Exhibit 21 seal it says "Metal Heel Hermetik subjected to continuous testing from 9-9-35 to 10-7-35" (p. 235). The drawings and the tag are contemporaneous proof. The tests were on the regular stand-

ard testing machine and showed that the seal was very satisfactory (pp. 241, 402). Such tests are the same as those used by the Victor Co. (p. 192). The tests simulated actual service conditions with sufficient clearness to make it certain that the device would perform its intended function in actual service (p. 402). The tests were a demonstration in fact as contradistinguished from one in theory (p. 267). Johnson and Klein agree that the tests lasted about a month. Appellee's brief (p. 24) cites Johnson's testimony that they lasted 72 hours which Johnson corrected on the next page (p. 269). The seal was a complete actual reduction to practice.

Johnson swore to his application on July 29, 1936 (p. 608).

The application was filed August 5, 1936.

There is no contradiction as to any of the above facts.

There are no dates for the Victor seals, which are respectively earlier than Johnson's dates. He was the first inventor.

IV. Defendant's Seals, Shown on Pages 10 and 11 of Appellant's Opening Brief and in the Upper Line on Page 15 of That Brief, Infringe.

The Appellee's only argument on non-infringement is that it was not proved that defendant's seals have been used in places where "protection from wear by contact with adjacent moving parts" is achieved. But that is immaterial because the seals are constructed to achieve such protection if and when they were used in an assembly where such protection is necessary.

The "adjacent moving parts" are not an element of the claim and appellee does not contend that they are. The cases which Appellee cites (pp. 19, 20 of its brief) relate

to functional whereby clauses. The cases are to the point that if the elements or parts in a defendant's device, alleged to correspond to those specified in a claim, do not perform the cooperative function of the claimed elements, they are not the same or the equivalent of the elements of the claim. This is no more than the familiar rule of patent law that equivalency is tested by the functions of the parts in question and if they perform the same functions they are the same or equivalent and if they do not they are not the same or equivalent. The rule is stated in *Machine Co. v. Murphy*, 97 U.S. 120 at p. 125:

“Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.”

The “whereby clause” of the Johnson claim is a statement of the result to be achieved when the seal is used where there may be adjacent moving parts as explained by Johnson (p. 285). As to a similar whereby clause in a patent claim Judge Hough in *Electro-Dynamic Co. v. Westinghouse Co.*, 191 Fed. 506 C.C.S.D. N.Y., said p. 508:

“That this ‘Whereby clause’ adds nothing to the claim is fundamental. It is a statement of asserted result, not of method or means of reaching it; and in this instance it is but a repetition of the stated ‘object of my invention’ with which the application begins, a sort of q.e.d. triumphantly affixed to the asserted solution of the problem.”

For a full discussion of the different sorts of whereby clauses, see 21 *Georgetown Law Journal*, pp. 291-305, in an article by the well known authority on patents, Leon H. Amdur.

The claim of the Johnson patent is for “an oil seal” having two elements (1) “a cup member” and (2) “a molded resilient sealing member.”

(1) The cup member has two features, “a peripheral portion” and “an axially inwardly offset radial flange.”

The “peripheral portion” has two functions; first to enclose the other parts of the seal and second to bear against the surrounding bore and form an oil-tight fit therewith.

The “flange” has two functions, first, it extends axially beyond the sealing member to protect it from adjacent moving parts and, second, it is the sole supporting and holding means for the sealing member.

(2) The “sealing member” has annular portions or lips on each side of the flange and tie portions extending through the holes in the flange bonding the lips together. Thus the sealing member performs the functions, first, of embracing both sides of the flange, second, of being bonded to both sides of the flange by cement and by the tie parts extending through the holes of the flange, and third, of making an oil-tight engagement with the shaft.

The defendant’s Victor oil seals, as shown in the chart Ex. 10, p. 521, have the same combination of both of these

elements of the claim, which perform the above named functions and are combined in the same way to provide the same mode of operation and to accomplish the same result. The Victor seals therefore infringe.

It is significant that Appellee's Brief (p. 30) admits that the Victor Co. "took out some improvement patents," obviously referring to Heinze et al. No. 2,240,332 (p. 539) showing the Victor Type H seal. Subordination of these seals to Johnson's invention as an embodiment thereof seems thus to be conceded.

V. The Findings of Facts of the District Court Are Not Conclusive.

Findings of Fact V and VI, p. 57, on which appellee relies, are that "the alleged invention and improvement claimed in the Johnson patent" were disclosed in various prior patents, including the five named specifically. And the Conclusions of Law are that the claim of the Johnson patent is invalid for lack of novelty and for lack of invention."

Appellee contends that the Findings of Fact should not be set aside "unless clearly erroneous" under Rule 52a of the Rules of Civil Procedure. Appellee does not contend that the Conclusions of Law to the same effect are subject to the same Rule.

The Findings of Fact are based on the Court's interpretation of Johnson's claim. That question is one of law. *Coupe v. Royer*, 155 U.S. 565.

The Findings of Fact are based, therefore, on a matter of law and are not true findings of fact. The District Court did not find in what way the seals of the prior patents met Johnson's claim. He made no findings of fact comparing the seal construction of Johnson with the sev-

eral seal constructions of the prior patents and he made no attempt to show that Johnson's construction is the same as or similar to that of any of the prior patents.

The Court's Findings of Fact are really Conclusions of Law because they are based on the Court's interpretation of Johnson's claim. The Findings to have been "of Fact" should have been limited to the facts of the several constructions of the patents. Had they been so limited they would have been "clearly erroneous."

VI. Cold Flow in Johnson and Victor Does Not Cause Leakage.

Appellee's brief begs the question of "cold flow" by setting up a man of straw.

Johnson did not prevent the cold flow of rubber-like synthetic materials* but he was the first to discover how such materials could be used in an oil seal without the loosening of the synthetic sealing member in its attachment to the cup member and thereby without leakage of oil between the sealing member and the cup member.

In Johnson and in the Victor seals the sealing member is attached to a single piece of metal, the annular flange, and is under no pressure at the place of attachment. Therefore there is no cold flow or relative movement between the sealing member and the flange and the seal remains oil-tight.

Any such sealing member is subject to cold flow at the place where there is pressure, as by the garter spring. Such cold flow is typified by the slight distortion of the sealing member axially in plaintiff's Exhibit 21 but this does not affect the oil-tightness of the attachment of the sealing member to the flange, which prevents leaks.

*A set or loss of resiliency or recovery, something like the flowing of putty when squeezed between the fingers (p. 463).

When Appellee's brief, p. 8, argues that the Johnson sealing member has cold flow because it may have such axial distortion, it is confusing the matter. The cold flow, which it is essential to avoid, and was avoided by Johnson, is the cold flow of the material which would loosen its attachment to the cup and cause leakage. This did occur in Gits and was inevitable in all seals in which a synthetic sealing member is held by a clamp.

The claim of the Johnson patent specifies that the sealing member is bonded to both sides of the flange. This is accomplished by cement and by the ties of the material extending through the holes in the flange. **The claim thus excludes the oil seals of the prior art, namely Gits and others, in which the sealing member is clamped, as in a vise, between holding members or rings which press against it on both sides.**

VII. Gits and His Patent Do Not Anticipate—"The Damn Things Leaked."

Appellee's brief bases its greatest reliance on Gits. But Gits does not disclose or suggest Johnson's invention.

In the Gits construction (p. 701), there is a housing 1 which has an inward radial flange 2 which is bent axially. This is the only resemblance which the Gits construction has to the Johnson seal.

In Gits there is a clamping member 11 which is expanded to clamp the sealing or packing member between it and the inner rim of the clamping portion 6 of the housing. The Gits patent states, page 1, col. 2, line 51:

"A clamping member comprising an annular ductile ring 11 is utilized to secure the packing member to the flange of the shell or housing 1."

On page 2, col. 1, line 14, the Gits patent states:

“The clamping ring 11 is then swedged or rolled, or otherwise suitably expanded outwardly, so as to embed itself in the clamping portion 6 of the packing member and securely clamp the same against the edge of the outside portion 4 of the flange 2.”

There is no flange on the housing of Gits which performs the function of the flange of the Johnson patent and claim because the Gits flange is not the sole support of the sealing member. The Gits sealing member is not the same as the sealing member of Johnson because it does not embrace the flange and is not bonded to both sides of the flange. **On the contrary, the sealing member of Gits is clamped between the flange and the expanded clamping ring. The compression is all that holds it** (Gits, p. 330).

This construction was found, in the tests of the Gits device with a sealing member of synthetic material, to be a failure. Tarbox testified (p. 398), “The final test on them showed they were not satisfactory.” The pressure of the clamps caused the sealing member, when hot, to flow (Gits, p. 329). It became loose in its clamp and permitted the leakage of oil. **“The damn things leaked”** as Haushalter, who had been the Development Engineer in the New Products Department of the B. F. Goodrich Rubber Co., testified (p. 381). On the testing fixture in the Gits plant the seal leaked as Gits admitted (p. 317).

Only experimental seals with sealing members of synthetic material were given out, i.e., those to the Spicer Co. They were failures and abandoned (Gits, p. 317). But 74,000 Gits seals with leather sealing members were sold to Spicer (p. 308).

The Gits history demonstrates that there was before Johnson a strong demand for an oil seal with a synthetic sealing member (Haushalter, p. 369) which presented the problem of leaking. Neither Gits nor any one else before Johnson solved that problem.

The four patents, relied on by the District Court and by Appellee in addition to Gits, are Chandler, Fitzgerald, Heinze and Winter, which with Gits are shown on page 15 of our Opening Brief.

No one of them has any feature pertinent to Johnson which is not disclosed by Gits. In each of them the sealing member is clamped on each side by the case members. Like Gits, each of them lacks an annular flange on the cup member, which is the sole support for the sealing member. Each lacks a sealing member, which embraces both sides of the flange and is bonded to both sides of the flange. These patents, like Gits, therefore fail to anticipate or suggest the Johnson invention.

VIII. The Other Patents Cited by Appellee Are Irrelevant.

Appellee's brief, p. 16, cites five other patents to show "several ways," besides clamping, for securing the sealing member to the cup member. No one of these is the way employed by Johnson and by Victor in the infringing seals.

In Peterson, No. 2,114,908 (p. 724), the sealing member is cemented on one side only, either to the outside housing or to an inside ring. Although issued to the Victor Co., it was never used (Aukers, p. 231).

Penick, No. 1,817,095 (p. 660), was a file wrapper reference. It shows a "Pump Packing." It has no casing or cup member and therefore no flange on a cup member,

which is embraced on both sides by a sealing member which is bonded to it on both sides. The Patent Office conceded that Penick did not disclose Johnson's invention.

The Lord patent, No. 1,996,210 (p. 675), shows a "Joint" in a motor mounting. It is not an oil seal and lacks the casing or cup member of an oil seal and the sealing member. It is in a different art and would have to be reconstructed to convert it into an oil seal as Aukers admitted (p. 230).

The Walker patent, No. 2,028,635 (p. 747), is for a "Fluid Pump Packing." It is as irrelevant as Penick.

The Miller patent, No. 2,004,669 (p. 692), shows a piston "Packing Cup" in which the packing ring is cemented to a disc on the piston. It is like Penick and has no resemblance to Johnson (p. 250).

These five additional patents add nothing pertinent to what is shown by Gits and the other four patents on which the District Court relied.

The drawing of Gits opposite page 14 of Appellee's Brief and the text of the Brief are both significant because they fail to assert that the sealing member of Gits is bonded to both sides of the radial flange. It is not so bonded (p. 353). The Brief (p. 14) admits that "other prior art patents" referred to on that page do not meet Johnson's claim because they also lack the "limitation that the sealing element be secured to 'both sides of' the radial flange." And the Brief also admits (p. 15) that the prior patents thereafter referred to on page 16 also lack the same "limitation." The combination of elements to which Johnson's claim is limited is thus conceded to be new.

To summarize:

No patent in the prior art discloses an oil seal, as described and claimed by Johnson and as typified by the infringing Victor seals, having in combination:

a cup member having a peripheral portion which makes an oil-tight fit with the bore of the housing and a radial flange which is the sole support of the sealing member and is offset axially to protect the molded material from contact with adjacent moving parts and

a sealing member which embraces both sides of the flange and is bonded to both sides of the flange (specifically by cement and by the tie pieces of the material of the sealing member which extend through perforations in the flange).

This oil seal construction was new with Johnson. It provides a new mode of operation, namely, the anchoring of the sealing member to the cup member without pressure on the sealing member. It secures a new result, essential to the use of a sealing member of rubber-like composition material which is subject to cold flow, namely, the prevention of loosening of the sealing member, thereby preventing leaks.

IX. Klein Not an Inventor—Either Sole or With Johnson.

Klein was in charge of fabricating and testing new devices at the plaintiff's plant. His sole contribution to the Johnson seal was devising a mechanical method for molding the sealing member to the flange. The Appellee in its brief, p. 35, gives only a fragment of Klein's testimony, which taken by itself is misleading.

Mr. Klein makes the matter clear on pp. 440-443:

“Q. I want to clear up, Mr. Klein, in what sense you used the word ‘imagining’ and ‘imagination.’ I want to read to you the claim from the Johnson Patent, and ask you whether you or Mr. L. A. Johnson thought of these different things.

Who thought of using 'a cup member having peripheral portion an axially inwardly offset radial flange'?

A. That was Mr. Johnson.

* * * * *

Q. What elements did you conceive and what elements did Mr. Johnson conceive?

A. My contribution to the thing was the bonding of the element to the case to make a two-piece oil seal out of it.

Q. You mean in the manufacturing of it?

A. That is right.

Q. In making it?

A. Yes.

* * * * *

Q. Who thought of having the molded resilient sealing member bonded to both sides of the radial flange at the offset 'so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset'?

A. That was Mr. Johnson.

Q. That was his idea?

A. That is right.

Q. Well, then, in what sense did you use the word when you said that in the preparation of your sketch, Exhibit 20, some of your imaginings went into that sketch?

A. That can be illustrated by this sketch of the mold here on this—what do you call it? Exhibit—

Q. Exhibit 20.

A. On Exhibit 20 I show here a section of the mold positioned into the case and contoured like the sealing element as an illustration of how this seal could be molded with two pieces plus a spring—in two pieces plus the garter type spring.

Q. Then as I understand it, your imagination went into the fabrication of it?

A. That is right.

Q. The way of making it?

A. That is right.

* * * * *

XQ. Counsel for plaintiff asked you regarding certain elements. Now, I wish you would tell us without the patent claim before you what elements you presented and what elements Mr. Johnson presented? Just tell us.

A. We were working on the development of the simplest possible type of synthetic oil seal with the least possible number of parts and the lowest possible manufacturing cost.

In connection with that the outer case was suggested by Mr. Johnson and the bonding of the material to the case was presented by myself and illustrated in this sketch, Exhibit 20.

In addition to the contouring of the seal I sketched a cross-section, a small portion of the cross-section of the mold, pointing out the advantages of such a seal and showing how it could be molded. That just about covers it.

XQ. Now, what do you mean by 'bonded'? That was your idea. What did you mean by 'bonded'?

A. It would be a mechanical application to the metal part.

XQ. And you used cement for bonding as you made this, is that right?

A. That is right.

XQ. And that bonding idea was yours?

A. The application of the material to the steel was mine. The application of synthetic material to the steel was mine. That is, the mechanics of the thing was mine. [64]

XQ. The outer case was Johnson's idea?

A. That is right.

XQ. Whose idea was it of having an offset flange?

A. Mr. Johnson's."

Mr. Johnson, referring to a drawing, Exhibit 20, p. 532, made by Klein, testified (p. 232):

“Q. Did you have anything to do with the making of that drawing?

A. Yes.

Q. What did you have to do with it?

A. I had previously made a sketch of this seal in question and instructed Mr. Klein to make a sketch of it, and then supervised the testing of the seal.”

The testimony of both Klein and Johnson shows that Johnson was the sole inventor of the seal and that Klein was simply called in by him to make a sketch and to devise the mold and the mechanical means for fabricating the seal. Johnson had made the invention before he called in Klein.

Under such circumstances Klein is not either the sole inventor or a joint inventor of the invention. *Agawam Co. v. Jordan*, 7 Wall. (74 U.S.) 583, 602, 603 and 606.

X. Appellant Has Not Been Guilty of Laches.

Appellee's brief makes only one comment that requires an answer. It complains that the plaintiff did not notify the Chanslor & Lyon Co. of the patent and its infringement. It is sufficient that the plaintiff did notify the Victor Co. It was unnecessary and would not have been commendable to threaten the Victor Co.'s customers since the manufacturer itself had been put on notice.

Moreover, this suit was brought within the six year statutory period and therefore there was no laches. *Craftint Mfg. Co. v. Baker*, 94 F.(2) 369, 374 (C.C.A. 9).

Furthermore, even if there were laches it would not be a valid reason for refusing a decree sustaining the patent and ordering an injunction. *McLean v. Fleming*, 96 U.S. 245, 253, 257; *Menendez v. Holt*, 128 U.S. 514, 524, 525.

Conclusion

For the foregoing reasons and for those given in Appellant's Opening Brief the Johnson patent should be held valid and infringed and an appropriate decree ordered.

Respectfully submitted,

A. DONHAM OWEN,

Counsel for Appellant-Plaintiff.

No .11632

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. COBURN COOK, as Trustee,
Appellant,
vs.

BAXTER CREEK IRRIGATION DISTRICT
and the Landowners, H. J. CLARK, LURLEY
CLARK, LEONORA M. BAILEY, LYAL
ZEITLER, GEORGE McROREY, RACHEL
McROREY, MR. and MRS. E. A. BLICKEN-
STAFF and JAMES N. FARRELL and AMY
L. FARRELL,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

PAUL P. O'BRIEN

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. COBURN COOK, as Trustee,
Appellant,
vs.

BAXTER CREEK IRRIGATION DISTRICT
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McROREY, MR. and MRS. E. A. BLICKEN-
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Transcript of Record

Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California
Northern Division

No. 10750

In the Matter of the
BAXTER CREEK IRRIGATION DISTRICT,
Bankrupt.

PETITION FOR CONFIRMATION
OF COMPOSITION

To the Honorable Martin I. Welsh, Judge of the
Above Entitled Court:

Comes now the Baxter Creek Irrigation District, an irrigation district, organized under the laws of California, relating to the organization of Irrigation Districts and petitions the Court for a confirmation of the plan of composition, of its bonded, coupon, warrant and judgment debt, attached hereto, under the provisions of Sections 81 to 84, inclusive, of the Bankruptcy Act of the United States and in support of this petition your petitioner alleges:

I.

That the Baxter Creek Irrigation District was organized in the year 1917 and has existed continuously since that date as an Irrigation District located wholly within Lassen County, California.

II.

That on or about the 1st day of July, 1921, the said District caused to be issued and sold, in the

manner provided by law, its coupon bonds in the total sum of \$511,000.00 and bearing interest at 6% per annum, which interest is evidence [1*] by semi-annual interest coupons attached to each of said bonds, and such bonds being in denomination of \$1,000.00 and payable to bearer, and numbered consecutively from 1 to 511 and maturing serially from 1926 to 1943.

III.

That none of the principal of said bonds has been paid and interest coupons dated July 1, 1925, and subsequent are past due and unpaid on all of the above mentioned bonds except that a few of said interest coupons have been paid or redeemed.

IV.

That since the organization of said District it has issued certain warrants; that some of said warrants have not been paid; that some of said warrants have been registered; that there are now outstanding and unpaid known warrants in the sum of \$53,207.66.

V.

That certain judgments have been obtained against said District on some of the aforementioned bonds, coupons, and warrants and upon some of the judgments so obtained on said bonds, coupons and warrants; that said judgments have not been paid and are more particularly set forth in the plan of composition and schedule attached to this petition.

* Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

That although said District desires to compromise and liquidate its indebtedness, nothing in this petition and/or plan and schedules attached hereto shall be considered or operate as a waiver of any and all defenses, including the statute of limitations of said District to the aforementioned indebtedness in case the plan of composition be not approved or carried out and/or to any action or suit against said District on said indebtedness or any part of it. [2]

VII.

That said bonds, coupons, warrants and judgments above mentioned are payable, according to the laws of California, from annual assessments levied upon and constituting liens upon the lands within the boundaries of the District; that the annual assessments required to meet the outstanding bonded, coupon, warrant and judgment indebtedness and the interest thereon are greater than the landowners can pay and the total outstanding debt of the district is much greater than the value of the lands within the district; that as a result a major portion of the lands within the district have been sold to the district for failure to pay assessments and because of this situation the ability of the district to pay its obligations has been further reduced until it has become impossible, and the district is and has been for many years, insolvent and unable to meet its debts as they have matured, or will mature, making it imperative that the district effect

a composition of its bonded, coupon, warrant and judgment debt in order to continue in existence.

VIII.

That said District has been unable to produce and/or deliver any water to the lands within said district for over ten years and is still unable to do so; that the flumes, ditches, dams, tunnel and other physical properties of the district are in disrepair; that the Division of Water Resources of the State of California has cancelled all permits of the District to appropriate water from Eagle Lake, the only source of water of said district;

IX.

That a plan of composition of the bonded coupon, warrant and judgment indebtedness of the district has been agreed upon between the district and Mr. W. Coburn Cook, representing 79% of the outstanding bonded, coupon, warrant, and judgment debt and the interest [3] thereon and such plan is attached hereto and is by these presents presented to the Court.

X.

That by the execution of the attached plan of composition, the creditors of the District owning 80% in amount of the securities of the District have consented in writing to the plan of composition attached hereto.

XI.

That the indebtedness of the district affected by the plan of composition attached hereto is the outstanding bonded, coupon, warrant and judgment indebtedness described above and as a result there is only one class of creditor.

XII.

That a list of the known owners of the outstanding bonds of the district together with their addresses, where known, and the amounts of their claims is attached hereto, marked Exhibit 'A', and by reference made a part of this petition; that such list shows separately those creditors who have accepted the plan of composition attached hereto and also those creditors who have not accepted the plan of composition; that such list contains the title of Court and Civil Action numbers of certain judgments on some of said bonds and coupons.

XIII.

That a list of the purported outstanding warrants of the district showing the numbers, dates, amounts, and payees of said warrants, that are known, is attached hereto, marked Exhibit 'B', and by reference made a part of this petition; that such list shows the present known owners where different than the original payee of said warrants where possible; that such list shows what warrants that have been reduced to judgment; that such list shows the addresses of the present owners of said warrants

where known and the addresses of the original payees where known of those warrants which have not been [4] transferred to known transferees; that such list shows separately those creditors who have accepted the plan of composition attached hereto and also those creditors who have not accepted the plan of composition.

XIV.

That the owners of the lands within the boundaries of the district are affected by the plan of composition attached hereto and therefore there is attached hereto marked Exhibit 'C', and by reference made a part hereof, a list of the known record owners, together with their addresses where known, of all the lands within the boundaries of the district affected by the plan of composition attached hereto.

XV.

That it is the intention and purpose of said district in filing this petition to procure approval of the plan of composition hereto attached and to liquidate, discharge, pay and satisfy pursuant to the terms and provisions of said plan and order of this United States District Court all bonds, coupons, warrants ever issued by said district and judgments thereon against said district whether listed or not, and that no mistake contained in the petition and/or plan and schedule hereto attached as to the amounts of said bonds, coupons, warrants and judgments thereon shall invalidate this plan and that all holders of said debts shall have the opportunity to file and present their claims in this composition proceeding as provided for by the Court. [5]

Wherefore your Petitioner prays:

1. That the Court enter an order herein approving the petition and the filing thereof under the provisions of the Bankruptcy Act and directing that notice of these proceedings be given as required by the Bankruptcy Act and fixing a date of hearing upon this petition and
2. That upon the completion of the hearing an interlocutory decree be entered approving the plan and putting the same into effect and
3. That the Court make such other orders that are allowed by virtue of Sec. 403 or 11 U.S.C.A.
4. That upon the completion of the plan of composition, a final decree be entered, discharging petitioner from all debts and liabilities in accordance with such plan and
5. That the Court grant such further orders, decrees and relief in the premises as may be required to complete the jurisdiction of the Court and as may be deemed just and equitable.

BAXTER CREEK
IRRIGATION DISTRICT,
By H. J. CLARK,
President.

Attest:

FERN S. OHMAN,
Secretary.
/s/ FRANKLIN A. DILL,
Attorney for Petitioner. [6]

State of California,
County of Lassen—ss.

H. J. Clark, being first duly sworn, deposes and says:

That he is the president of the Board of Directors of the Baxter Creek Irrigation District; that he has read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge, and that he is authorized by resolution of said Board of Directors to sign and verify the foregoing petition.

H. J. CLARK,

Subscribed and sworn to before me this 28th day of August, 1945.

FERN S. OHMAN,

Notary Public in and for the County of Lassen,
State of California.

[Endorsed]: Filed Sept. 17, 1945. [7]

EXHIBIT A

Division A-1

Baxter Creek Irrigation District
 List of Bonds Consenting to
 Plans of Composition

Owner and Address	Bond No. S	Amount	Date of Earliest Attached Coupon
Bondholders' Committee	1/5	5,000	Jan. 1926
c/o W. E. Buell	6	1,000	July 1925
227 Sherlock Building	7/18	12,000	Jan. 1926
Portland, Oregon	19/20, 22	3,000	July 1925
	23/31, 34/37	13,000	Jan. 1926
	39/40	2,000	July 1925
	41/57, 64/73	27,000	Jan. 1926
	74/78	5,000	July 1925
	83/84	2,000	July 1925
	86/1 15	30,000	Jan. 1926
	117/129	13,000	Jan. 1926
	135/138	4,000	Jan. 1927
	140	1,000	July 1925
	141/144	4,000	Jan. 1926
	145/149	5,000	July 1925
	150/154	5,000	Jan. 1926
	155/164	10,000	July 1925
	165/167	3,000	July 1925
	168/172	5,000	July 1925
	173/175	3,000	Jan. 1926
	177/196	20,000	Jan. 1926
	198/202	5,000	July 1925
	203/216	14,000	Jan. 1926
	222/237	16,000	Jan. 1926
	240/259	20,000	July 1925
	260/262	3,000	Jan. 1926
	263	1,000	Jan. 1927
	264/283	20,000	Jan. 1926

Owner and Address	Bond No. S	Amount	Date of Earliest Attached Coupon
Bondholders' Committee	286/290	5,000	July 1925
c/o W. E. Buell	299	1,000	Jan. 1926
227 Sherlock Building	300/304	5,000	July 1926
Portland, Oregon	305/319	15,000	Jan. 1926
	320/324	5,000	July 1925
	325/329	5,000	Jan. 1926
	330/332	3,000	July 1925
	333/337	5,000	Jan. 1926
	338/340	3,000	July 1925
	341	1,000	July 1926
	343/346	4,000	July 1926
	348/357	10,000	Jan. 1926
	358/359	2,000	July 1926
	361/363	2,000	Jan. 1926
	364/365	2,000	Jan. 1926
	366/367, 371	3,000	July 1925
	372	1,000	July 1926
	373	1,000	July 1925
	374/375, 377	3,000	Jan. 1926
	378/382	5,000	Jan. 1927
	383/397	15,000	Jan. 1926
	399	1,000	July 1925
	402/403	2,000	July 1925
	411/415	5,000	Jan. 1934
	416/419	4,000	Jan. 1926
	420/432	13,000	July 1925
	433/437	5,000	Jan. 1926
	438/442	5,000	July 1925
	445/449	5,000	Jan. 1925
	465/488	24,000	Jan. 1926
	490/491	2,000	Jan. 1926
	492/496	5,000	July 1927
	499/504	6,000	Jan. 1926
	507/511	5,000	Jan. 1934
	32/33	2,000	Jan. 1926
	38	1,000	Jan. 1925
	79/81, 85	4,000	Jan. 1925
	238/239	2,000	Jan. 1926
	297/298	2,000	July 1925
	450/454	5,000	Jan. 1926
Total.....	446 Bonds	\$446,000	

Judgments and/or Actions on Baxter Creek
Irrigation District Bonds and/or Coupons

The following actions and/or judgments have been filed and/or obtained on certain of the bonds and/or coupons attached thereto which heretofore have been listed as owned by the Bondholders Protective Committee and/or on the judgments so obtained on said bonds and/or coupons in the Superior Court of the State of California in and for the County of Lassen:

1.	Victor Etienne, Jr:	J. F. Katenkamp	
		vs. Baxter Creek I D.	No. 3935
2.	“	“	No. 4168
3.	“	“	No. 4026
4.	“	“	No. 4240
5.	Lewis Grigsby	“	No. 4265
6.	Victor Etienne, Jr:	“	No. 4550
7.	“	“	No. 4618
8.	“	“	No. 4620
9.	“	“	No. 4771
10.	“	R. F. Gill vs.	
		Baxter Creek I. D.	No. 5465
11.	“	“	No. 5466

EXHIBIT A

Division B

Baxter Creek I. D. Bondholders
Who Have Not Consented to Plan

Bond Nos.	Owner's Name & Address	Number of Bonds	Amount
21, 218/221, 284/285 291/296, 368/370, 408/410, 457/458, 463/464	Pueblo Trading Co..... Gardnerville, Nevada Pueblo Trading Co. has a judgment on Bonds No. 21, 218/221, 284/285, 291/296 in the case of Pueblo Trad- ing Co. vs. Baxter Creek I. D., Action No. 4195-L of the U. S. District Court, Northern District, Northern Division	23	\$23,000
58/63, 116 139, 176, 197, 217, 342, 347, 360, 363, 376, 401, 443, 444, 459, 462, 497, 498 505	Unknown	26	26,000
82	Albert R. Hermann..... 611 Van Nuys Bldg. Los Angeles, Calif. and 210 West 7th Street Los Angeles, Calif. Albert R. Hermann procured a judgment against Baxter Creek I. D. on bond 82 and on coupons 8-19, inclusive, thereon in action No. 4700 of the Superior Court of the State of California in and for the County of Lassen.	1	1,000

Bond Nos.	Owner's Name & Address	Number of Bonds	Amount
130/134	Elmer Howard 247 Arguello Blvd. San Francisco, California Elmer Howard procured a judgment against Baxter Creek I. D. on bonds 130/134, inclusive, and on certain coupons thereon in action No. 4824 of the Superior Court of the State of California, in and for the County of Lassen. This judg- ment was sued on in Action No. 5626 in said Court.	5	5,000
489, 506	J. R. Mason 1920 Lake St. San Francisco, California	2	2,000
		<hr/> 57	<hr/> \$57,000

EXHIBIT C

Baxter Creek Irrigation District

If U. S. District Court rules that lands belonging to the following owners are not within the Baxter Creek Irrigation District they will not be considered part of Exhibit B of the Plan of Composition.

Plat No.	Name	Address
1	Bailey, Lenora	Milford, California
2	Bailey, Lenora	Milford, California
6	Clark, H. J. and Lurley	Standish, California
13	Farrell, Jas. M. and Amy	Susanville, California
17	McRorey, George F. and Rachel	Milford, California
21	May Florence Stiles Estate c/o Dermott Stiles	Burney Falls, California
23	Zeitler, Lyal and Cathleen	Janesville, California

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein.

Dated November 1, 1945.

RUTH E. COOK.

[Endorsed]: Filed Nov. 7, 1945. [13]

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein.

W. E. BUELL.

Dated at Portland, Oregon, September 8, 1945.

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein.

Dated November 1, 1945.

PUEBLO TRADING
COMPANY,

a Nevada Corporation,

By W. COBURN COOK,

President.

[?] ANDERSON,

Secretary.

[Endorsed]: Filed Dec. 6, 1945. [15]

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein.

Dated November 1, 1945.

E. B. DELBON.

[Endorsed]: Filed Nov. 7, 1945. [16]

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein. I am the owner of Baxter Creek Irrigation District Bonds Nos. 407 and 505.

VICTOR ETIENNE, JR.

[Endorsed]: Filed Dec. 6, 1945. [17]

[Title of District Court and Cause.]

CONSENT

I hereby consent to the plan of composition filed herein.

ELMER HOWARD.

[Endorsed]: Filed Nov. 21, 1945. [18]

[Title of District Court and Cause.]

STATEMENT OF BONDHOLDERS PROTECTIVE COMMITTEE OF TULE AND BAXTER CREEK IRRIGATION DISTRICTS RELATIVE TO ITS EXPENSES INCIDENT TO THE PLAN OF COMPOSITION HEREIN INCURRED BY THE SAID COMMITTEE AND RELATIVE TO ITS REPRESENTATION OF BONDHOLDERS AND RELATIVE TO THE MATTERS REQUIRED TO BE STATED AND SHOWN BY TITLE 11, Sec. 403, (a) and (b), U.S.C.A., AND ITS PETITION FOR AN ORDER APPROVING THE SAME

To the Honorable Martin I. Welsh, U. S. District Judge:

Come now Victor Etienne, Jr., Leo G. MacLaughlin and William E. Buell, as and constituting the Bondholders Protective Committee of the Tule Irrigation District and Baxter Creek Irrigation District bondholders, herein called the committee, and respectfully show:

1. That these petitioners are constituted a bondholders protective committee under the terms of an agreement dated June 1, 1926, entered into between the said Bondholders Protective Committee and certain bondholders of said district, a copy of which agreement is hereunto annexed marked Exhibit "A" and by this reference made a part hereof, and it is further represented that said Bondholders

Protective Agreement was not executed in contemplation of this particular or any other bankruptcy [19] proceeding, and at a time prior to the enactment of the Municipal Bankruptcy Act, and that by the terms of said agreement, the said committee are the legal holders of the bonds and coupons held by them, of which however the individual certificate holders are the beneficiaries, and they further respectfully represent that the expenses and fees which have been incurred by said committee are and have been incurred pursuant to said agreement and are valid and binding upon the parties to said agreement and not subject to modification by this Honorable Court. Nevertheless, petitioners request the approval thereof by this court and fully disclose all matters pertaining to the operation of said Bondholders Protective Committee.

2. The committee further respectfully represents that a list of the creditors represented by said committee, showing the name and address of each such creditor is set forth and annexed to the petition herein of the said district for composition denoted Exhibit A, Division A-(3) attached to the petition for composition herein and that a statement of the amount, class and character of the securities held by said committee is fully set forth in Exhibit A, Division A (1) attached to said petition, and said exhibits are hereby referred to and made a part hereof by this reference.

That said committee pursuant to the authority given it by said agreement entered into a contract with Mr. W. Coburn Cook, an attorney at Turlock,

California, copy of which is hereunto annexed and marked "Exhibit B" and made a part hereof by this reference, which said agreement authorized the said W. Coburn Cook to negotiate and perfect a plan of composition of the debts of said irrigation districts and which agreement provided for certain fees and compensation to be paid to him in consideration of the matters set forth in said contract, and except as to the matters set forth herein under the heading of "Claims and [20] Expenses" the said bondholders protective agreement and the said contract with W. Coburn Cook disclose all compensation to be received by said W. Coburn Cook and said committee further respectfully represents that no fiscal agent, attorney or other person, firm or corporation promoting the composition on behalf of said committee has been or is to be compensated directly or indirectly by either of said irrigation districts, either by fee, commission or other similar payment, by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue, and that the only compensation to be allowed or paid to said W. Coburn Cook as respects the bonds held by this committee is that which is set forth in the annexed Exhibit "B" and under the heading "Claims and Expenses."

Claims and Expenses

3. Said committee further respectfully represents the following is a statement of claims and expenses and fees incurred, allowed, approved and to be paid by said committee direct out of the pro-

ceeds received in this composition proceeding. In this connection be it noted that the said Bondholders Protective Agreement was a composite or joint and several agreement with the bondholders of the Tule Irrigation District and Baxter Creek Irrigation District, and that the items of expense incurred were incurred by the committee as a committee for both groups of bondholders as a whole. That the fees agreed to be paid were agreed to be paid by the committee as a whole, that is as representative of creditors of both districts. All expenses, claims, fees, charges are to be prorated and to be paid and charged out of the funds available for the creditors of Tule Irrigation District and Baxter Creek Irrigation District in proportion to the principal face amount of the bonds held by the committee of each district, and in this respect it is shown that the principal face amount thereof held by this committee in the [21] Tule Irrigation District is the sum of \$714,000, and the principal amount held by it of bonds of the Baxter Creek Irrigation District is the sum of \$446,000, and the hereinafter described fees, charges, expenses are to be prorated between the two sets of creditors on the basis of 61.55% for Tule Irrigation District and 38.45% for Baxter Creek Irrigation District.

Statement of Expenses of Committee

1. Traveling expenses of Leo G. MacLaughlin, member of committee...\$ 750.00
2. Advances and expenses incurred by Victor Etienne, Jr., member of committee 1,000.00

3. Traveling expenses of W. E. Buell,
member of committee.....\$ 977.78
4. Legal services of Orrick, Dahlquist,
Neff, Brown & Herrington and
George Herrington, of Financial
Center Building, San Francisco, in
consultations with committee and
committee members and actions
brought by the committee to pre-
vent the bar of the statute of limita-
tions running, defense of actions
against the committee, negotiations,
correspondence from the year 1926
to the present time..... 3,800.00
5. Legal services due and payable to
W. Coburn Cook, Berg Building,
Turlock, California, in special pro-
ceedings on behalf of and for the
benefit of the bondholders protec-
tive committee, including services in
a representative capacity in the case
of Pueblo Trading Co. v. Tule Irrig-
ation District and Pueblo Trad-
ing Co. v. Baxter Creek Irrigation
District, proceedings in relation to
assessment of lands in the Tule Irrig-
ation District and Baxter Creek
Irrigation District, and pertaining
to the expulsion of land and refer-
ence thereto 3,500.00

6. Anglo-California National Bank as depositary, San Francisco, California, being a compromise of its claim of \$8,470.05 in connection with the deposit, issuance of certificates, and custody of the bonds and other services pursuant to the deposit agreement for the period from 1926 to the present time, for the period ending December 31, 1943.....\$1,000.00
7. And in addition thereto a reasonable sum to be afterwards disclosed to the court and approved for service from December 31, 1943, to closing of the account, and including disbursements made and services in connection therewith, and additional depositary fees.

Wherefore, said Bondholders Protective Committee prays that this Honorable Court approve the foregoing, including allowance of fees and disbursements, as well as approval of the contract [22] between said W. Coburn Cook and the respective districts.

VICTOR ETIENNE, JR.,
LEO G. MacLAUGHLIN,
W. E. BUELL.

State of Oregon,
County of Multnomah—ss.

William E. Buell, being duly sworn, deposes and says:

That he is secretary of the Bondholders Protective Committee of the Tule and Baxter Creek Irrigation Districts; that as such secretary he makes this verification for and on behalf of the said Bondholders Protective Committee; that he has read the foregoing Statement and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon information or belief, and as to those matters he believes it to be true.

W. E. BUELL.

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] O. F. BOYLE,
Notary Public in and for the County of Multnomah, State of Oregon.

[Endorsed]: Filed Oct. 31, 1945. [23]

EXHIBIT "B"

Agreement

Dated: October 1, 1943
San Francisco, California

Whereas, the Tule Irrigation District heretofore issued \$806,000 principal amount of its 6% bonds, and Baxter Creek Irrigation District heretofore issued \$511,000 principal amount of its 6% bonds, and whereas said districts have each defaulted and been in default of payment of principal and interest since 1925 and there is now outstanding and

unpaid in principal amount of bonded indebtedness of said districts approximately \$1,317,000;

And Whereas, certain of the bondholders of said district entered into a Bondholders Protective Agreement on June 1, 1926, or thereabouts, with themselves and Victor Etienne, Jr., and others (called the Committee) and which agreement is hereby referred to, and the said bondholders entering into said agreement have deposited their bonds in the principal amount of \$714,000 Tule Irrigation District and \$446,000 Baxter Creek Irrigation District, with the Anglo California Trust Company in San Francisco, California, now The Anglo California National Bank of San Francisco, as depository and which said deposits and the records thereof of said bank are referred to and whereas the said Committee is now composed of Victor Etienne, Jr., Leo G. MacLaughlin, Raymond F. Gill, W. E. Buell, and R. J. McMullen;

Now, Therefore, under authority of a resolution passed unanimously by the said members of the Committee at [24] a regular meeting thereof held at San Francisco, California, October 1st, 1943, and by virtue of the authority vested in the said Committee and each of the members thereof, this agreement is executed by said Committee as representatives of the said depositing bondholders as Party of the First Part, and W. Coburn Cook, an attorney, of Turlock, California, Party of the Second Part, and witnesseth:

1. The Committee hereby expresses its determination to carry the plan of reorganization into

practical operation by taking any and all steps necessary to acquire all or any of the lands in said districts on behalf of the bondholders, to sell or dispose of the same or to compromise its claims against the same and distribute the net proceeds among the bondholders. For the purpose of carrying said plan into practical operation the Committee hereby determines that a cash settlement with the Districts or any landholder equivalent substantially to the net recovery which could be anticipated in the event the district actually took title and resold the property shall be the equivalent of such sale and disposition. For the purpose of carrying out said plan the Committee hereby employs W. Coburn Cook and said W. Coburn Cook, as attorney for the Committee, is hereby authorized and directed to commence, prosecute, defend, compromise or dismiss any and all actions as in his discretion may be necessary or to exercise and enforce any and all rights and remedies appertaining to the deposited securities and to compromise, adjust release and surrender any and all rights, claims and demands and security in respect thereto, and to collect, compromise, sell, transfer, exchange, trade or otherwise deal in properties or lands in the district or the proceeds thereof; to receive any moneys, properties or benefits in [25] exchange or sale, compromise or otherwise and to enter into composition with the respective boards of directors of each of said districts and to initiate and agree to the initiation of any composition proceeding under the National Bankruptcy Act of the purpose of carrying said

plan into practical operation. The said W. Coburn Cook is further authorized and empowered to manage, sell, deal in, lease or otherwise handle or dispose of all properties he may receive in carrying out said plan, to reduce the same to cash and to deposit the proceeds thereof as provided herein.

2. Said W. Coburn Cook, party of the second part, is hereby authorized, if in his discretion it may be necessary, to formulate any refunding program or other plan for the liquidation of said indebtedness and to present the same to said Committee for adoption in the event it shall be determined that it is impractical to carry out the plan above set forth.

3. The party of the second part agrees that he will pay all expenses of litigation and handling the transactions contemplated hereby at his own expense, except that he will not be expected to pay bankruptcy fees or expenses in connection with any bankruptcy or composition proceeding nor counsel fees of the committee itself. He is hereby granted full authority to receive property in any exchange and authority to handle the property and to resell or otherwise deal, manage, or dispose thereof and he will be entitled to charge against said property the expenses of handling the same, including taxes and operating costs and other capital or current charges. He will reduce to cash any property he receives in exchange for properties already in the District. [26]

4. The said party of the second part shall surely and truly report and account to the Committee from

time to time on his acts and the results thereof and will deposit the cash proceeds thereof in the Anglo California National Bank of San Francisco, less his compensation.

5. It is understood that the party of the first part holds in trust of said indebtedness an amount approximately 89% of the total outstanding bonded indebtedness, and it is also understood that said party of the second part represents certain other of said bonded indebtedness not deposited with the Committee and in addition represents certain judgments against the said districts, and in this respect the Committee understands the possible conflict of interest and acknowledges that the same has been disclosed to the Committee, and nevertheless enter into this agreement.

6. The party of the second part undertakes the liquidation of said indebtedness through the means indicated by this agreement.

7. For his services in this matter the party of the second part shall receive a compensation to be determined as follows: The Committee shall receive 85% of the first \$89,000.00 received or made available for the Committee on account of said securities, and the said party of the second part shall receive as his compensation 15% thereof. As to any amount received for and on behalf of the Committee whether in cash, property or otherwise, over and above the said \$89,000.00, the Committee shall receive 50% thereof, the party of the second part shall be entitled to 50% thereof. [27]

In Witness Whereof, this agreement is executed
October 1, 1943.

VICTOR ETIENNE, JR.,
LEO G. MacLAUGHLIN,
RAYMOND F. GILL,
R. J. McMULLEN,
W. E. BUELL,

Members of Bondholders Protective Committee,
Party of the First Part.

/s/ W. COBURN COOK,

Party of the Second Part.

(Notaries and dates of acknowledgments.)

D. B. Richards, City and County of S. F.,
Nov. 22, 1943.

Emma L. Everest, Los Angeles, Nov. 23, 1943.

Catherine E. Keith, City and County of S. F.,
Nov. 26, 1943.

Chas. M. Miller, Alameda, Nov. 30, 1943.

A. H. Miller, Multnomah County, Oregon,
Nov. 4, 1943.

Gilbert Moody, Stanislaus, December 7, 1943.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter coming on regularly to
be heard upon the petition of the Baxter Creek
Irrigation District for confirmation of its Plan of
Composition of its indebtedness on the 7th day of

December, 1945, before the above-entitled Court, and Franklin A. Hill, Esq., appearing for petitioner and W. Coburn Cook, Esq., appearing for the Bondholders' Protective Committee for said District, and evidence, both oral and documentary, having been introduced and the matter having been submitted and it appearing that the petition having been duly and regularly filed and notices given thereon pursuant to the order of this Court and the matter having been set for hearing this date and the Court having considered the law and the facts and having arrived at its decision herein, now makes and files these, its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds the facts in this matter to be as follows: [29]

I.

That on the 17th day of September, 1945, the petitioner herein filed with this Court its verified petition seeking a composition with its creditors of its indebtedness under the provisions of the National Bankruptcy Act relative to local taxing agencies; that petitioner is an irrigation district organized and existing under and by virtue of the Irrigation District Law of the State of California and is a proper party and qualified to file its petition herein under the provisions of the National Bankruptcy Act and the laws of the State of California, and is located wholly within Lassen County, State of California, and wholly within the jurisdiction of this Court.

II.

That on the 17th day of September, 1945, this Court duly made and entered its order approving the filing of the aforesaid petition; that on the same date said Court duly made and entered its order directing that notice be given in accordance with the terms and provisions of said National Bankruptcy Act and setting a time and place for hearing thereon and providing for the notices as to the form, place, manner and date for filing of claims; that notice of time and place of hearing and notice as to the form, place, manner and date for filing of claims was duly and regularly given in accordance with the order of the above Court and of the National Bankruptcy Law; that no answers or objections were filed to said petition or Plan of Composition by anyone, including creditors and landowners, and the time expired for the filing of answers or objections.

III.

That the District owns, holds and controls none of the securities and claims affected by the Plan.

IV.

That the Plan of Composition has been submitted to and duly approved by the California District's Securities Commission.

V.

That said Plan of Composition as herein and herewith submitted is fair and reasonable and is not discriminatory and is equitable and for the best inter-

ests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors and has been accepted and approved as required by Chapter IX of the National Bankruptcy Act by more than 96% of the aggregate amount of claims of all classes, including deposited and non-deposited bonds, deposited and non-deposited coupon, deposited and non-deposited warrants and deposited and non-deposited judgments.

VI.

That the offer of the Plan of Composition and its acceptance are in good faith.

VII.

That it is for the best interests of all parties concerned, including the creditors, the landowners and the District that said Plan of Composition be approved and confirmed.

VIII.

That the bonds, coupons, warrants and judgments affected by this Plan are but a single clan of obligations, payable from a common source.

IX.

That the Petitioner has no funds in the bond, warrant, judgment or coupon funds and no funds in any other fund or source from which said securities or the judgments against said District can be or are entitled to be paid. [31]

X.

That the State of California has duly and regularly authorized said District to subject itself to the jurisdiction of the United States District Court and of this Court in proceedings under the National Bankruptcy Act.

XI.

That said District and petitioner is insolvent in that it is unable to pay its bonded indebtedness, coupon (interest) indebtedness, warrant indebtedness and judgment indebtedness or any one or more of said indebtedness as due; that it has been unable to pay the interest of its bonded indebtedness since 1925; that there is now due, owing and unpaid past due installments of interest on its said bonds an amount in excess of \$340,340.00; that the bonds, to wit, Nos. 1-511, First Issue, Series 1 to 18, 6% per annum (\$1,000.00 face value) in the total sum of \$511,000.00, are all of the general obligation bonds of the petitioner and are all now unpaid, due and owing; that it has not paid its warrant indebtedness as due for over twenty years; that the unpaid interest (now due and owing) on said warrants approximates and in certain cases exceeds the face amounts of said warrants; that the face value of said unpaid warrants amounts to \$54,537.66; that said District has never paid its judgments listed in the Plan; that it is not within the ability of the landowners and holders in said District to pay the said amount of past due interest and/or principal of said bonds, coupons, warrants and judgments;

that any levy (assessments) or levies to pay these said amounts would be confiscatory and would result in a disruption of the District and the abandonment of said land and would cause a loss to the Lassen County tax roll and would have a deleterious effect upon said District and upon the whole County of Lassen; that said District is now, and was [32] at the time of the filing of the Petition for Composition herein and had been for over twenty years prior thereto unable to meet its debts as they matured and was and now is insolvent.

XII.

That beginning with the year 1922 the taxpayers within said District commenced to default in the payment of the assessments levied by said District; that the rate of delinquency increased during each successive year thereafter that assessments were made; that the taxpayers were also unable to pay water tolls which were levied several years in lieu of assessments to pay the indebtedness of the District; that a great majority of said taxpayers also were unable to pay their State and County real property taxes; that as a result of the inability to pay taxes and district assessments a large proportion of the lands within the district were sold and deeded both to the State of California and to said District; that banks and other lending agencies have refused and still refuse to advance loans to farmers on their land within the district and/or to loan to the district; that the redemption costs for the 1943 and 1944 assessments amount to over \$2,500,000 as of

Sept. 17, 1945, for the lands within the district; that none of these assessments have been paid;

XIII.

That the lands within said District are of a poor quality; that they are situated in a dry arid region; that the rainfall is insufficient for the regular production of crops and a large proportion of the lands have no other source of water than the rainfall; that less than ten tracts listed in the Plan have any other water rights and these are of a third priority class and furnish insufficient water for the proper and economical farming of said tracts by themselves; that the District has been unable to supply water for over ten years last past and is still unable to do so;

XIV.

That the water rights, tunnel, riparian rights on Eagle Lake, flowage rights, easements, rights of way, right to lower the water in Eagle Lake, and other rights and properties of the Tule and Baxter Creek Irrigations Districts which are to be transferred to the Trustee for the benefit of the creditors [33] affected by the Plans for each District as set forth in said Plans are of the fair market value of \$325,000.00; that the Tule Irrigation District was and is the owner of 153/250 interest in the aforesaid rights and properties and the Baxter Creek Irrigation District the owner of an 97/250 interest; that the cost of the easements and rights of ways and the right to lower Eagle Lake, as distinguished from the right to withdraw water from Eagle Lake which latter

right was granted to said Districts by the Division of Water Resources of the State of California, cost the Districts in 1921 over \$150,000.00; that the cost of the tunnel to tap said lake cost approximately \$500,000.00; that the total cost of the tunnel, aforementioned rights and distributing system to said Districts in 1921 was \$1,250,000.00.

XV.

That W. Coburn Cook, representing over 79% of the outstanding bonds and accrued interest thereon, has entered into a contract with the petitioner which contract is the Plan of Composition; that over 96% of the aggregate amount of all claims of all classes affected by said Plan (the District owning, holding and controlling none) had accepted said Plan in writing at the time of the hearing on the merits.

XVI.

That W. Coburn Cook is an agent hired by the creditors he represents; that he has filed herein and offered in evidence his written contract of employment with said creditors and said contract, together with Paragraph III of said Plan, reveals the compensation that he is to receive for his work in effecting the plan of compensation with said District and acting as trustee under the plan filed herein in carrying out the provisions of the Plan and such compensation [34] is reasonable and fair and is the only compensation that he will receive for his efforts in this matter.

XVII.

That the statement of expenses filed by the Bondholders Protective Committee is fair and reasonable; that the services of W. Colburn Cook in the Pueblo Trading Co. v. Baxter Creek Irrigation District No. 4195 L were performed in a representative capacity for all creditors of said District.

XVIII.

That the agreement between Franklin A. Dill, attorney for petitioner, and petitioner for his services in the negotiation, preparation, execution and prosecution of the Plan and the Petition for Composition and for obtaining the deposit and consent of holders of securities to be charged against the District is fair, reasonable and just; that said agreement together with the minutes of August 1, 1944, of said District which minutes the agreement modified and the statement of income and expenses of said District (both which were introduced into evidence) reveal the compensation that he is to receive for his aforesaid services, which is to be charged against and paid for by the District; that said agreement should be approved; that the aforesaid services have benefited the creditors, landowners and the District; that it is fair, just and reasonable that out of the compensation to be allowed W. Coburn Cook as trustee, he is to pay the District the sum of \$250.00 to be disbursed and paid by the District to Franklin A. Dill in addition to the compensation he is to receive by virtue of the aforesaid agreement;

XIX.

That the statement of income and expenses of the [35] District paid and/or incurred incident to the negotiation, preparation, execution and prosecution of the Plan of Composition and for obtaining the deposit and consent of holders of securities is fair, reasonable, and just and should be allowed and approved; that the aforesaid expenses and the expense for compensation for the attorney of petitioner referred to in Finding XVIII should be paid from the funds disclosed in said statement and from an additional 3% assessment to be levied against the amount listed in the column labeled "Amount" in (Exhibit) Schedule "B" of the Plan of Composition for each of the tracts (plats) of land subject to assessment for the indebtedness of the District which are listed on pages 1 to 9 inclusive in (Exhibit) Schedule "B" to the Plan now on file herein; that said 3% assessment should be added to the sum listed in the column labeled "Total Amount" in said Schedule "B" to the Plan, and the total amount is to be used as the redemption value under the Plan; that said assessment is fair, just, equitable, and reasonable; that the funds to be produced and raised by the aforesaid 3% assessment are to be returned to the District by the depository provided for in said Plan as each tract is redeemed pursuant to said Plan and/or as each tract is deeded to the Trustee pursuant to said Plan; that the funds raised by the said assessment shall be returned to the District by the depository at the same time as the funds known as "Bal: Exp: Assess:" in (Exhibit) Sched-

ule "B" of the Plan are returned and shall be in addition to such "Bal: Exp: Assess:" funds; that the Trustee shall see that the depositary returns and pays said funds as above provided; that the aforementioned modification of said Plan is not materially adverse or adverse to any degree or extent to any creditors or holder or owner of any security, claim or land affected by this Plan and proceeding.

XX.

That no fiscal agent, person, attorney, firm or corporation is to receive any compensation either directly or indirectly from said petitioner, the creditors or from both the creditors and the petitioner, or from any of the creditors either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue or otherwise in consummating the said plan; that the only compensation and payment of expenses to be received and allowed to any fiscal agent, attorney, person, firm or corporation are those reasonable and just expenses connected with or incidental to these proceedings and which are disclosed in Findings XVI, XVII, XVIII and XIX.

XXI.

That the present or future owners of any of the aforesaid tracts of land may take advantage of Paragraph VII of the Plan of Composition in this Court or in any other competent Court at any time prior to April 24, 1947.

XXII.

That each, all and every redemption value set up in the Plan and as modified in Finding XIX are fair, just and reasonable.

XXIII.

That the Reconstruction Finance Corporation of the United States of America has refused to refinance said District; that the Farm Debt Adjustment Committee of Lassen County has been unable to refinance said District or to pay or discharge its indebtedness either wholly or in part. [37]

XXIV.

That said Plan of Composition as filed and modified complies with the provisions of Chapter IX of the National Bankruptcy Act as amended.

XXV.

That said Plan of Composition has been accepted and approved as required and provided for by the provisions of subdivision (d) of Section 83 (U.S.C.A. Title 11, Section 403) of the National Bankruptcy Act as amended.

XXVI.

That the District is duly authorized by law to take all action necessary to be taken by it to file, prosecute, modify and carry out the Plan and the filing of said Petition and Plan were duly authorized by the duly qualified, elected, appointed and

acting officers and directors of Petitioner, and the filing of the Petition herein was authorized by a proper resolution duly passed and adopted by the Board of Directors of said District prior to the filing of said Petition and the execution of said Plan was likewise duly authorized by a proper resolution duly passed and adopted by said Board; that all Court and Clerk costs and fees and other fees required by law for the filing of said Petition and the giving of notice required by law have been duly paid.

XXVII.

That unless all holders of bonds, coupons, and warrants of the District and holders of judgments and actions against said District who may seek to enforce such securities and claims in a manner contrary to or inconsistent with the terms and provisions of the Plan of Composition herein provided for are restrained, the Petitioner would be interfered with in carrying out said Plan of Composition and the jurisdiction of this Court would be interfered with and the petitioner [38] would be irreparably damaged.

XXVIII.

That the Plan of Composition affects all the District's bonds, coupons, warrants, and judgments against said District; that it is the intention of the District and the Trustee that all of the aforementioned claims and securities are to be liquidated, discharged, paid and satisfied pursuant to the terms

of said Plan, and the orders of this Court whether said claims and securities are listed in said Plan or Petition or not; that the District reserves all rights and defenses referred to in Paragraph VI of its Petition.

XXIX.

That under said Plan, petitioner proposes to pay its creditors the largest amount that can be paid to them; that it is unable to pay any more to the creditors than as set forth in the Plan; that all the allegations in Paragraphs VII and VIII of the Petition are true; that the District assessments are far greater than the ability of the land to produce.

XXX.

That the modification of the Plan was authorized by proper resolutions duly passed and adopted by the Board of Directors of said District; that the Bondholders' Protective Committee and the other creditors named in the escrow instructions which are on file and were introduced in evidence and which together constitute the holders of over 93% in amount of all securities affected by the Plan (exclusive of any such securities owned, held or controlled by the Petitioner) consented in writing to the modification of the Plan; that the offer and acceptance of said modification are made in good faith; [39] that the Petitioner joined in the petition of Franklin A. Dill, its attorney, for an allowance for compensation and for approval of his agreement referred to in Finding XVIII.

XXXI.

That at the time of the filing of the Petition the petitioner was and now is insolvent; that under said Plan petitioner proposes to pay its creditors affected by the Plan the largest amount that can be paid to them. [40]

CONCLUSIONS OF LAW

From the foregoing facts, the Court concludes as a matter of law as follows:

I.

That this Court has jurisdiction of the subject matter of this proceeding and of all parties to and persons interested in this proceeding, including all persons affected by the Plan of Composition herein set forth.

II.

That the Plan of Composition herein set forth is fair, equitable and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; that under said Plan, petitioner proposes to pay its creditors the largest amount that can be paid to them; that the petitioner is unable to pay any more to the creditors than as set forth in the Plan.

III.

That the Plan of Composition herein sought to be confirmed complies with the provisions of Chapter IX of the National Bankruptcy Act (U.S.C.A. Title 11, Sections 401-404).

IV.

That said Plan of Composition herewith submitted for confirmation has been accepted and approved as required by the provisions of subdivision (d) of Section 403 of Title 11, U.S.C.A.

V.

That all amounts to be paid by petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; that the petition of Franklin A. Dill, Esq., attorney for petitioner, for an allowance for reasonable compensation for attorney fees for his legal services and advice in the negotiation, preparation, execution and filing of the Plan [41] of Composition should be granted and his agreement for compensation to be assessed against said District and paid by said District is fair and reasonable and should be allowed and approved and payment of an additional sum of Two Hundred Fifty and no/100 Dollars (\$250.00) should be made by W. Coburn Cook as Trustee from his compensation allowed pursuant to the Plan; that said Two Hundred Fifty and no/100 Dollars (\$250.00) should be paid to Petitioner who shall then pay said sum to its attorney, Franklin A. Dill, as part of the reasonable compensation to be allowed him; that the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) is in addition to the payment provided for in said agreement and is allowed and assessed pursuant to Section 403b of Title 11, U.S.C.A.; that the statement of expenses of the Bondholders' Protective Committee

and the contract of W. Coburn Cook, Esq., are fair and reasonable and should be allowed and approved.

VI.

That the offer of the Plan of Composition herein submitted for confirmation and its acceptance are in good faith.

VII.

That the petitioner herein is authorized by law to take all action necessary to be taken by it to carry out the plan herewith submitted for confirmation.

VIII.

That the petitioner herein is entitled to have an order and decree confirming and approving the Plan of Composition herein submitted for confirmation.

IX.

That the petitioner herein is entitled to an injunction against the holders and owners of all its bonds, coupons, warrants and judgments against said petitioner affected by the Plan of Composition as filed and as modified by this Court enjoining and [42] restraining all of such owners and holders from in anywise commencing or prosecuting any action or actions or otherwise seeking to enforce any of said bonds, coupons, warrants and judgments in any manner inconsistent with or not in conformity with the terms and provisions of said Plan of Composition herewith approved.

X.

That the petitioner herein was at the time of the filing of its petition in this matter, and is now, unable to meet its debts as they mature, except only in accordance with the terms or provisions of the Plan of Composition herein submitted for confirmation.

XI.

That at the time of the filing of petitioner's petition herein, creditors of the petitioner owning not less than 80 per centum in amount of the securities affected by the Plan of Composition herein submitted for confirmation (excluding, however, any such securities owned, held or controlled by the petitioner) had accepted in writing said Plan of Composition.

XII.

That at the time of the trial of the issues herein the Plan of Composition herein submitted for confirmation had been accepted in writing by and on behalf of creditors holding in excess of 96 per centum of the aggregate amount of claims of all classes affected by said Plan (excluding claims owned, held or controlled by petitioner).

XIII.

That all of the securities and claims affected by the Plan of Composition are of one class; that the creditors of the District affected by the Plan are those designated and referred to in the Plan and Petition of Confirmation; that all holders of securi-

ties and claims as listed in said Plan and Petition and/ or of the same nature are affected by the Plan.

XIV.

Any landowner listed in Schedule B of the Plan or his successor and/or the holder of any interest in said land have the right to contest the liability of said land or lands to the operation of this Plan, in this Court or any other Court, on the ground that said land or lands are not now or never were within the boundaries of the Petitioner.

XV.

That the statement of income and expenses of the District paid and/or incurred incident to the negotiation, preparation, execution and prosecution of the Plan of Composition and for obtaining the deposit and consent of holders of securities is fair, reasonable, and just and should be allowed and approved; that the aforesaid expenses and the expense for compensation for the attorney of petitioner referred to in Finding XVIII should be paid from the funds disclosed in said statement and from an additional 3% assessment to be levied against the amount listed in the column labeled "Amount" in (Exhibit) Schedule "B" of the Plan of Composition for each of the tracts (plats) of land subject to assessment for the indebtedness of the District which are listed on pages 1 to 9 inclusive in (Exhibit) Schedule "B" to the Plan now on file herein; that said 3% assessment should be added to the sum listed in the column labeled "Total Amount" in

said Schedule "B" to the Plan, and the total amount is to be used as the redemption value under the Plan; that said assessment is fair, just, equitable, and reasonable; that the funds to be produced and raised by the aforesaid 3% assessment is to be returned to the District by the depositary provided for in said Plan as each tract is redeemed pursuant to said Plan and/or as each tract is deeded to the Trustee pursuant to said Plan; that the funds raised by the said [44] assessment shall be returned to the District by the depositary at the same time as the funds known as "Bal: Exp: Assess:" in (Exhibit) Schedule "B" by the Plan are returned and shall be in addition to such "Bal: Exp: Assess:" funds; that the Trustee shall see that the depositary returns and pays said funds as above provided: that the aforementioned modification of said Plan is not materially adverse or adverse to any degree or extent to any creditors or holder or owner of any security, claim or land affected by this Plan and Proceeding.

XVI.

That no fiscal agent, person, attorney, firm or corporation is to receive any compensation either directly or indirectly from said petitioner, the creditors or from both the creditors and the petitioner, or from any of the creditors either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue or otherwise in consummating the said plan; that the only

compensation and payment of expenses to be received and allowed to any fiscal agent, attorney, person, firm or corporation are those reasonable and just expenses connected with or incidental to these proceedings and which are disclosed in Findings XVI, XVII, XVIII and XIX.

XVII.

That the present or future owners of any of the aforesaid tracts of land may take advantage of Paragraph VII of the Plan of Composition in this Court or in any other competent Court at any time prior to April 24, 1947. [45]

XVIII.

That the modification of the Plan was authorized by proper resolutions duly passed and adopted by the Board of Directors of said District; that the Bondholders' Protective Committee and the other creditors named in the escrow instructions which are on file and were introduced in evidence and which together constitute the holders of over 93% in amount of all securities affected by the Plan (exclusive of any such securities owned, held or controlled by the Petitioner) consented in writing to the modification of the Plan; that the offer and acceptance of said modification are made in good faith;

XIX.

That at the time of the filing of the Petition, the petitioner was and now is insolvent; that under

said Plan petitioner proposes to pay its creditors affected by the Plan the largest amount that can be paid to them;

XX.

That the petitioner is entitled to a decree confirming the Plan of Composition herein submitted for confirmation and as modified by the Court as set forth in Finding XIX on file herein, and in accordance with these findings and conclusions that said Plan of Composition shall be, and is hereby, made effective forthwith and the same shall become and be binding upon all creditors and claimants affected by the Plan forthwith, and the Baxter Creek Irrigation District, petitioner, is hereby authorized and directed to take all necessary or desirable steps, in accordance with its terms as modified. [46]

XXI.

That the Plan of Composition as filed and as modified affects all the District's bonds, coupons, warrants, and judgments against said District and the Trustee and the District intend that all of the aforementioned claims and securities be liquidated, discharged, paid and satisfied pursuant to the terms of said Plan and the orders of this Court whether said claims and securities are listed in said Plan or Petition or not; that the District reserves all rights and defenses referred to in paragraph VI of its Petition.

XXII.

That under said Plan, petitioner proposes to pay

its creditors the largest amount that can be paid to them; that it is unable to pay any more to the creditors than as set forth in the Plan.

Dated this 3rd day of January, 1946.

/s/ MARTIN I. WELSH,
Judge,
United States
District Court.

[Endorsed]: Filed Jan. 3, 1946. [47]

In the United States District Court for the Northern
District of California, Northern Division

No. 10750

IN THE MATTER OF THE BAXTER CREEK
IRRIGATION DISTRICT,

Bankrupt.

INTERLOCUTORY DECREE

The above entitled matter, after notice duly and regularly given, having regularly come on for hearing on the 7th day of December, 1945, before the above entitled Court, Honorable Martin I. Welsh, District Court Judge presiding, upon the merits of the Plan of Composition proposed by Petitioner, Baxter Creek Irrigation District, upon the petition filed by said Petitioner; and Franklin A. Dill, Esq. appearing for the Petitioner and W. Coburn Cook,

Esq. appearing for the Bondholders Protective Committee; and

It appearing and having been found by this Court that said petition was properly filed under Chapter IX of the National Bankruptcy Act as amended (U. S. C. A. Title 11, Sections 401-404) and that said petition complies with said Chapter and was filed in good faith; and

It appearing that all due and required notice and notices have been duly and regularly given; and

It appearing that the Plan of Composition filed and submitted with the petition had at the time of said filing been consented to and accepted by creditors owning not less than [48] eighty (80) per centum in amount of the securities affected by the Plan (the District owning, holding and controlling none of said securities); and

It appearing at the hearing on the merits that at said time creditors holding in excess of ninety-six (96) per centum of the aggregate amount of claims of all classes affected by said Plan (the District owning, holding and controlling none) had accepted said Plan in writing; and

The matter having been heard and submitted for decision upon evidence, both oral and documentary, and the Court having made and filed written findings of fact and the said Judge's conclusions of law and having determined and decided that said Plan of Composition as prepared, filed and modified and submitted should be approved and confirmed:

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

1. That said petition was and is properly filed under Chapter IX of the National Bankruptcy Act (U. S. C. A. Title 11, Sections 401-404) and that said petition complies with said Chapter and was filed and is proposed and prosecuted in good faith, and that this Court has jurisdiction of said petition and the subject matter thereof and that the filing of said petition was duly authorized by the duly qualified, elected, appointed and acting officers and directors of Petitioner.

2. That the Petitioner, Baxter Creek Irrigation District is a duly and regularly organized and acting irrigation district under the California Irrigation District Act and the laws of the State of California, and that said Petitioner, as such duly and regularly organized and existing irrigation district did prepare, file and submit with said Petition the Plan of Compostion attached to the Petition, reference to which is hereby made and by such reference incorporated herein. [49]

3. That at the time of the filing of said petition creditors of the Petitioner owning in excess of eighty (80) per centum in amount of the securities affected by said Plan (exclusive of any such securities owned, held or controlled by the Petitioner) had in writing accepted said Plan.

4. That at the time of said hearing on the merits creditors of the petitioner owning and holding in excess of ninety-six (96) per centum of the aggregate amount of all claims of all classes affected by said Plan (excluding all claims owned, held or controlled by the Petitioner) had accepted in writing said Plan as filed and as modified.

5. That Petitioner was and now is insolvent and unable to meet its debts as they mature, although it has made diligent effort so to do, and that said Plan of Composition as prepared, filed, modified and submitted herein, is fair, equitable, and does not discriminate unfairly in favor of any creditor or class of creditors.

6. That said Plan of Composition as filed and as modified has been accepted and approved as required and provided for by the provisions of Subdivision (d) of Section 83 (U. S. C. A. Title 11, Section 403) of the National Bankruptcy Act as amended.

7. That said Plan of Composition as filed and as modified complies with the provisions of said Chapter IX of said National Bankruptcy Act as amended.

8. That all amounts to be paid by the Petitioner for services or expenses incident to said Plan of Composition and said composition contemplated thereby have been fully disclosed and are fair and reasonable; that the expenses incurred in the negotiation preparation, execution, filing, and prosecution of said Plan and the expenses incurred and to be incurred in this proceeding and the expenses necessary to carry out this Plan as set forth in Findings XVIII and XIX, on file herein, be and they are hereby approved as reasonable and necessary and the Petitioner is [50] authorized and directed to pay to its attorney, Franklin A. Dill, Esq. his fees and expenses and to pay each and all other items and amounts as set forth in said Findings as are necessary to carry out this Plan; that W. Co-

burn Cook, as Trustee, be and hereby is directed and ordered to pay to Petitioner the sum of \$250.00 to be paid by Petitioner to its said attorney in addition to the compensation due said attorney under his agreement with said Petitioner which said agreement is hereby approved.

9. That the statement of expenses of the Bondholders Protective Committee and the contract of W. Coburn Cook, Esq. are fair and reasonable and they and each of them are hereby allowed and approved.

10. That no fiscal agent, person, attorney, firm or corporation is to receive any compensation either directly or indirectly from said Petitioner, the creditors, from both the Petitioner and the creditors, or from any of the creditors either by fee, commission, or other evidence of indebtedness or otherwise whereby a profit could accrue in consummating the said plan; that the only compensation and payment of expenses to be received and allowed to any fiscal agent, person, attorney, firm or corporation are those reasonable, fair and just expenses connected with or incidental to those proceedings and which are disclosed in Findings XVI, XVII, XVIII and XIX.

11. That the offer of said Plan of Composition as filed and as modified and its acceptance and acceptances are in good faith.

12. That the Petitioner is authorized by law to take all action necessary to be taken by it to carry out the said Plan of Composition as filed and as modified.

13. That said Plan of Composition attached to the Petition herein as modified in Finding XIX and paragraph 14 of this decree be and it is hereby approved, confirmed, adopted, and allowed and said Plan of Composition as modified and submitted herein is [51] herein incorporated by reference and made a part hereof.

14. That the expenses and attorney fees referred to in Findings XVIII and XIX and which were approved and allowed in paragraph 8 of this decree should be paid from the funds disclosed in the Statement of income and expense referred to in said findings and from an additional 3% assessment to be levied against the amount listed in the column labeled "Amount" in (Exhibit) Schedule "B" of the Plan of Composition for each of the tracts (plats) of land subject to assessment for the indebtedness of the District which are listed on pages 1 to 9, inclusive, in said Schedule to said plan now on file herein; that said 3% assessment should be added to the sum listed in the column labeled "Total Amount" in said Schedule "B" to the Plan and the sum of the "Total Amount" and the said 3% additional assessment is to be used as the redemption value under the Plan; that said assessment is fair, just, equitable and reasonable; that the funds be produced and raised by the aforesaid assessment are to be returned to the District (Petitioner) by the depositary provided for in the Plan as each tract of land is redeemed pursuant to said Plan and/or as each tract is deeded to the Trustee pursuant to the plan; that the funds to be raised by

the said assessment shall be returned to the District by the depositary at the same time as the funds known as "Bal: Exp: Assess:" in (Exhibit) Schedule "B" of the Plan are returned and shall be in addition to such "Bal: Exp: Assess:" funds; that the Trustee shall see that the depositary returns and pays said funds as above provided; that the aforesaid modification of said Plan is not materially adverse or adverse to any degree or extent to any creditor or holder or owner of any security, claim or tract of land affected by this Plan; that the Plan of Composition as filed herein be and it is hereby modified as provided in this paragraph. [52]

15. That said Plan of Composition as adopted and approved in Paragraph 13 is hereby decreed to be, and is hereby made binding on all creditors affected by the said Plan of Composition, whether or not their claims have been filed or evidenced, and, if filed, or evidenced, whether allowed or not allowed, including creditors who have not, as well as those who have, accepted said Plan of Composition.

16. That each and all of the creditors of the Petitioner holding any security or securities affected by said Plan of Composition as adopted, including all of said bonds, all of said coupons, all of said warrants whether registered or not and all of said judgments, and the agents, servants, attorneys and employees of said creditors, or any of them, and their successors and assigns are hereby restrained and enjoined, from in anywise enforcing or attempting to enforce any of said bonds, coupons, warrants,

and judgments or any rights in connection therewith in any manner inconsistent with or contrary to the terms or provisions of said Plan of Composition or other than as in said Plan of Composition provided, and they and each of them be and hereby are enjoined, pending the entry of the final decree herein, from attempting the enforcement of any claim or lien by legal proceedings or otherwise which they may have against Petitioner or against any and all of the land situated within the boundaries of the District (Petitioner) and/or all land, if any, which was ever within said District.

17. That the presentation and submission of said unpaid bonds, coupons, judgments and warrants as in the Plan provided shall be, and is, a condition precedent to the right of any holder or owner of any bond, coupon, judgment or warrant to be paid or receive the payments provided for in said Plan of Composition or the enforcement thereof to the extent provided for in said [53] Plan of Composition.

18. That all bonds, interest coupons and warrants (irrespective of whether or not the same have been registered for nonpayment) of Petitioner and all judgments, more particularly described in the Plan of Composition and Petition herein and affected thereby, and which are to be made subject to the said Plan of Composition as adopted herein, are and were payable without preference out of funds derived from the same source or sources and were, and are, all of one class.

19. That all verified claims affected by the said

Plan of Composition and filed on or before December 7, 1945 are hereby allowed and approved and that such other claims filed before January 6, 1946 that may hereafter be approved by this Court shall be entitled to participate and share in the proceeds of the Plan of Composition as provided therein.

20. That this Court further hereby reserves the right and retains exclusive power and jurisdiction by appropriate order or orders hereafter entered to provide for and to carry out said Plan of Composition under and subject to the supervision and control of this Court and hereby specifically retains and shall have the exclusive jurisdiction of said cause and said Plan of Composition. That the debtor Baxter Creek Irrigation District or the Trustee may from time to time apply to this Court for such other order or orders as may be necessary to carry out and make effective this Interlocutory Decree and this Court hereby reserves and shall have full and complete jurisdiction of said Plan of Composition.

21. The depositary (disbursing agent) to wit: The First National Bank in Turlock shall pay only such claims as may have been approved by the Court and only as provided in the Plan of Composition, except upon further order of this Court. The approved claims shall be paid only upon the surrender to the [54] disbursing agent of the securities on which the respective claims are based, and only in conformity with the provisions of the Plan, except in case of claims on securities adjudged to have been lost which shall be paid upon the delivery to

said disbursing agent of satisfaction of the judgments which were based on said lost securities, and an assignment to the trustee by the claimant of all right, title and interest in and to said lost securities. That all securities shall be deposited with the depository as specified in the Plan within twelve (12) months of the time when the Interlocutory Decree becomes final.

22. That the First National Bank in Turlock, Turlock, California, is hereby appointed disbursing agent pursuant to the Plan of Composition and is hereby ordered to carry out the terms of said Plan as filed and as modified by this Decree and the Trustee, W. Coburn Cook, is also ordered to see that said disbursing agent complies with this Decree.

23. That the Plan of Composition as adopted in Paragraph 13 of this decree is hereby made temporarily operative with respect to all securities affected hereby; that the petitioner is hereby authorized to and shall forthwith take all steps required herein, and by said Plan of Composition hereby adopted and confirmed, to carry the same into effect forthwith.

24. That the time for the filing of claims for securities and debts of the District be and hereby is extended until January 6, 1946, and if such creditors do not file a claim or claims by said date they each and all of them shall be forever barred from claiming or asserting against the Petitioner or any individually or publicly owned property located within the petitioning District or the owners thereof

any claim or liens, arising out of said securities or other claim against said District.

25. That the Plan of Composition affects all the District's bonds, coupons, warrants and judgments against said District; that [55] it is the intention of the District and the Trustee that all of the aforementioned claims and securities are to be liquidated, discharged, paid and satisfied pursuant to the terms of said Plan, and the orders of this Court whether said claims and securities are listed in said Plan or Petition or not; that the District reserves all rights and defenses referred to in Paragraph VI of its Petition; that the District has not waived any of said rights or defenses.

26. That the present or future owners of any of the tracts of land subject of this Plan may take advantage of Paragraph VII of the Plan of Composition in this Court or in any other competent Court at any time prior to April 24, 1947.

27. W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein and authorized to carry out the terms of the plan of composition, and he may apply to this Court for orders of assistance to that end or for instructions, upon notice to the petitioner. The compensation of said Trustee is fixed at fifteen per cent (15%) of the first Thirty Eight Thousand Eight Hundred and No/100 Dollars (\$38,800.00) received by the Trustee or desopitary on behalf of the creditors of the Baxter Creek Irrigation District, and fifty per cent (50%) of all amounts received in excess thereof whether in cash, property or other-

wise, and he may at his option take his fee either in cash or property received.

28. The District is authorized to make the transfers and conveyances to W. Coburn Cook, Trustee, as provided by the plan and the trustee is authorized and directed to accept such conveyances and to administer the properties and to rent, hypothecate, sell or otherwise operate the same as trustee as in his discretion may seem advisable and for such purpose may designate an agent or agents.

29. The water rights, tunnel, riparian rights of Eagle Lake, flowage rights, easements, rights of way, right to lower the water in Eagle Lake and other rights and the property of Tule Irrigation [56] District and Baxter Creek Irrigation District, except such as are physically within the boundaries of either of said districts, were acquired, owned and held by the districts in the proportion of 153/250 by Tule Irrigation District and 97/250 by Baxter Creek Irrigation District, and are to be conveyed by the districts to the Trustee for the benefit of the Creditors in that proportion, and when sold or disposed of by the Trustee are to be accounted for by the Trustee to the creditors of said districts in the proportions of 153 Tule Irrigation District and 97 Baxter Creek Irrigation District.

Dated this 3rd day of January, 1946.

MARTIN I. WELSH,

Judge of the United States
District Court.

[Endorsed]: Filed Jan. 3, 1946. [57]

AGREEMENT

This Agreement made and entered into this 28th day of August, 1945, by and between W. Coburn Cook, hereinafter referred to as the Trustee, and the Baxter Creek Irrigation District, hereinafter referred to as the District.

Witnesseeth:

Whereas, the District is an Irrigation District duly organized under the laws of California relating to the organization of Irrigation Districts; that said Baxter Creek Irrigation District was organized in 1917 and since that date said District has existed continuously as an Irrigation District in Lassen County, California.

Whereas, on or about the 1st day of July, 1921, the District caused to be issued and sold in the manner provided by law its coupon bonds in the total sum of \$511,000 bearing 6% interest represented by coupons attached to each of said bonds, and such bonds being in the denomination of \$1,000.00 and payable to bearer, and numbered consecutively from 1 to 511 and maturing annually from 1926 to 1943;

And Whereas, none of the principal of said bonds has been paid and the interest coupons on bonds of said District due July 1, 1925, are partially in default, and all subsequent coupons are in default; and certain warrants of said district are in default;

And Whereas, the said Trustee has in his possession for the purpose of collection \$446,000 par value

of said bonds and interest coupons attached thereto which is 87.2% of the outstanding bonds; and said Trustee has in his possession certain judgments based on said bonds and coupons as more particularly set forth in Exhibit "A" attached to and made a part of this agreement;

And Whereas, the Pueblo Trading Company has secured a judgment in the United States District Court for the Northern District of California against the Baxter Creek Irrigation District in Action No. 4195 L, in the sum of \$35,013.16, and said judgment is dated the 20th day of March, 1940, and bears interest from such date until paid at the rate of 7% per anum. The aforementioned judgment represents a recovery on the following bonds and coupons together with accrued interest on the matured bonds and costs:

Bonds Nos. 21, 218, 219, 220, 221, 284, 285, 291, 292, 293, 294, 295, 296 (With July 1, 1925, and subsequent coupons on each and every bond).

And Whereas, the Baxter Creek Irrigation District has outstanding warrants in the principal sum of \$52,220.93, some of which warrants bear interest at the rate of 7% per annum and the interest earned on said warrants now approximates the principal of said warrants;

And Whereas, a compromise or liquidation of the outstanding bonds, coupons and warrants of the District and judgments against the District thereon must take into consideration the owners of the

bonds, coupons, warrants and judgments not held by the said Trustee. (These owners shall be hereinafter referred to as the Non-Depositing Creditors);

And Whereas, a schedule has been prepared and attached hereto and marked Exhibit "A" and by reference made a part hereof containing the numbers, denominations, and amounts of all bonds, coupons and warrants of said District and judgments or suits against said District in the possession of said Trustee.

And Whereas, the District has made no levies for the purpose of paying the outstanding bonds, coupons, warrants and judgments since 1927, except a levy made in 1943 which has not been paid;

And Whereas, all the bonds, coupons, warrants, issued and judgments against said District and above-mentioned are [59] general obligations of the District;

And Whereas, it is agreed by the parties hereto that the outstanding bonds, coupons, warrants, and aforementioned judgments are in an amount greater than the District can pay, and said District is insolvent;

And Whereas, the said Trustee and the District have carried on negotiations looking toward a compromise and a reduction of the outstanding bond, coupon, warrant and judgment indebtedness of the District, and a waiver of the general obligation feature of the bond and other indebtedness and an agreement permitting any individual landowner to

pay his adjusted share of the outstanding bond and other indebtedness and thus relieve his land of further liability for the payment of all the outstanding bond, interest (coupon) and warrant indebtedness, and other indebtedness represented by judgments thereon against said District;

And Whereas, a schedule has been prepared by the parties hereto in which each tract of land in the District has been listed and an amount set down opposite the description of each tract, which amount is substantially less than the present liability of such land for the payment of the present indebtedness of the District and such schedule has been attached hereto marked Exhibit "B," and by reference made a part of this contract;

Now, Therefore, in consideration of the mutual covenants the parties hereto agree as follows, and submit the following as a plan of composition in accordance with the provisions of Section 81 to 84 of the United States Bankruptcy Act.

I.

That the said Trustee, as trustee for all bondholders, coupon holders, warrant holders and such judgment holders will accept from any individual landowner in the District in full settlement of the liability of such land for the payment of all the outstanding bonds, coupons and warrants of said District [60] and judgments thereon against said District, the amount set forth in Exhibit "B" and labeled "Total Amount" opposite the description

of such land if paid in either of the ways herein-after specified;

(a) If the above referred to amount set forth in Exhibit "B" is paid in cash on or before 90 days after the time for appeal from the entry of an interlocutory decree approving this plan by the United States District Court has expired or within 90 days from the time any or all appeals from said interlocutory decree affirming the plan of composition are finally disposed of, whichever period is the longer, a 7½% discount will be allowed;

(b) If no appeal is taken and the above referred to amount set forth in Exhibit "B" is not paid within 90 days after the time for appeal from the interlocutory decree approving this plan by the United States District Court has expired, the above referred to amount will be accepted during a period of one year from the date of the interlocutory decree approving this plan, and thereafter the amounts listed in Exhibit "B" will be increased 10% each year until paid;

(c) If an appeal or appeals are taken from the interlocutory decree and the provisions of I(a) are not taken advantage of the above referred to amount will be accepted during a period of one year from the date of the final determination of said appeal or appeals affirming the plan of composition, and thereafter the amounts listed in Exhibit "B" will be increased 10% each year until paid;

(d) Should any landowner desire to postpone payments over a period of years, the said Trustee will accept a Note and Deed of Trust as hereinafter provided, in an amount equal to the amount above referred to in Schedule "B," provided, however, that such amounts shall be increased 10% for each year after the first year following the entry of the interlocutory decree approving this plan, if no appeal is taken, otherwise if any appeals are taken such amount shall be increased 10% for each year after the first year following the disposition of any and all appeals, affirming the plan. Such note and deed of trust shall be for a term of not [61] to exceed 10 years and shall bear interest at the rate of $4\frac{1}{2}\%$ per annum from the date of execution of the Note and Deed of Trust upon the unpaid principal and such Note and Deed of Trust shall be payable as follows:

10% of the principal upon the execution of such Note and Deed of Trust, and 10% or more of the remaining principal and the earned interest each year thereafter, until the full sum of principal and earned interest is paid in full; provided, however, that any landowner desiring to relieve his land of debt by the execution of a Note and Deed of Trust shall furnish the said Trustee with satisfactory proof that all taxes, liens and encumbrances are paid in full, and further satisfactory proof that such landowner has merchantable title to the land sought to be conveyed in trust, which proof may be by

abstract or a policy of title insurance issued by a company authorized to do such business in California. Taxes and assessments which have become a lien but are not yet payable shall be excepted from the foregoing. The Deed of Trust shall provide for the payment of current taxes by the landowner. The policy to be delivered contemporaneously with the recordation of the Deed of Trust.

The Trustee covenants, consents and agrees as Trustee for all holders of bonds, coupons, warrants and judgments, that upon the exercise by any or all of the landowners of any of the options set forth above in (a), (b), (c) and (d) of Paragraph I that the land and/or lands of said landowners or any or all of them may be excluded from the boundaries of said District upon the petition of said landowner or landowners and that said Trustee shall not make or interpose any objection to such exclusion or exclusions either as Trustee for the disposition of monies received on behalf of the above mentioned creditors of said District and/or as the holder of any interest or title to any lands, property or other rights located within or without the boundaries of said District and acquired pursuant to this agreement and/or plan of composition. [62]

Provided further that it is understood and agreed that the term landowner used in this paragraph shall be interpreted to mean only an individual landowner, or his heirs, devisees, assigns and/or personal representatives, and not the Baxter Creek

Irrigation District or any other municipal or public corporation.

Provided, however, that the landowner shall under all circumstances have the right within a period of 90 days after the time for appeal from the interlocutory decree has expired or within 90 days from the time any or all appeals from said interlocutory decree are finally disposed of or on or before April 24, 1947, whichever period is the longest, to exercise any of the landowner options granted herein. Provided, however, that if the landowner does not exercise one of the options provided for in Paragraph I (a), (b), (c), or (d) within the longest period provided for in this paragraph, then the landowner's option shall thereupon terminate. Should the landowner exercise any of the options given him herein within the time so provided the Trustee shall quitclaim to him any tax title acquired under this agreement.

II.

That in consideration of the agreement by said Trustee to release the land in the District from liability for payment of the outstanding bonds, coupons, and warrants of the District and Judgments thereon against said District in the manner provided above, the District agrees:

(a) To pay to the said Trustee all money in the Bond Fund and Warrant Fund of the District upon the entry of the interlocutory decree approving this contract and plan of composition by the

United States District Court as hereinafter provided in Paragraph II, Section (e) hereof or within 90 days after the time for appeal from said decree has expired whichever is the longer, and to pay to the said Trustee from time to time all money that thereafter may accrue to said Bond and Warrant Fund and also to make the necessary levies for bond, interest, warrants and judgments in an amount sufficient to carry out the provisions of this agreement; [63]

(b) To enforce the collection of such levies referred to in (a) and take deeds at the time and in the manner provided by the laws of California. The District shall take all deeds to all lands sold to the District for delinquent levies made on or after the year 1942 immediately upon the expiration of the time provided for redemption, and also on or after April 24, 1947, upon request of the Trustee shall take tax deeds for delinquent levies made prior to 1942.

(c) To cancel any such levies heretofore made or hereafter to be made upon lands in the District which have been released from liability for the payment of the aforementioned outstanding bonds, coupons, warrants and judgments in the manner provided in Paragraph I hereof and upon lands conveyed to said Trustee pursuant to this plan; provided that the amount of such sums so cancelled shall be considered paid and be credited on the books of the District as a payment upon the outstanding bonds, interest coupons, and warrants of

said District and judgments against the said District, and the parties hereto agree that the bond, interest, (coupon) warrant and judgment debt shall thereupon be deemed to be paid and reduced in the amount of the assessment so cancelled. That such cancellation shall not alter any of the other terms of this contract or void the consideration therefor.

(d) Within 6 months after the entry of the interlocutory decree approving this plan or within 6 months after the disposition of all appeals from said decree, whichever period is the longer, the District agrees to secure by negotiation or purchase all title of the State of California arising from real property tax sales in and to the lands to which the District also holds title except as to land owned by the State of California for highway, school, and other than tax purposes and to execute and deliver to the Trustee a deed to such property then standing in the name of the District. The Trustee hereby covenants and agrees that he will pay to and reimburse the District one-half of the cost and expense [64] incurred by the District in acquiring the aforementioned tax titles of the State of California. Neither the Trustee nor the District is obligated to expend more than \$500 in acquiring tax titles of the State of California.

Within 90 days after the time for appeal from the interlocutory decree approving this plan has expired or within 90 days from the time any or all appeals from said interlocutory decree are finally disposed of, whichever period is the longer, and

thereafter as title is acquired, said District shall convey to the said Trustee all lands theretofore or thereafter acquired by the District by reason of non-payment of 1943 or future assessments. Said deeds and conveyances to the Trustee shall convey such interest as the District may have at the time of the delivery thereof, provided the District shall only be required to execute to the Trustee a quitclaim deed to any right of way or property acquired by it from any railroad company. All property conveyed to the Trustee shall be released from liability to pay the outstanding bonds, coupons, warrants and judgments but said property shall remain and be liable for such pro rata assessments as are necessary to be levied by the District to carry out this plan. All such property so conveyed to the Trustee shall be sold or rented by him or his hired agent on such terms and at such prices as he shall determine in his best judgment as Trustee for all the holders and owners of bonds, coupons and warrants of the District and judgments against said District.

(c) To institute upon the execution of this agreement, and carry to a conclusion a proceeding in the United States District Court of the Northern District of California, under the provisions of the Bankruptcy Act of the United States relating to debt adjustments of Municipal Corporations, for the purpose of:

(1) Securing the confirmation of this plan by the said Court.

(2) Binding to the terms of this plan all outstanding bonds, warrants, and coupons issued by the District and judgments thereon as provided by the said Bankruptcy Act; and [65]

(3) Securing the confirmation of the Court to the provisions of this plan relating to the distribution of the moneys received by the Trustee as provided herein.

(f) It is also agreed and understood that the District on or before 90 days after the entry of the interlocutory decree approving this plan by the United States District Court as provided above or within 90 days after the disposition of all appeals from said decree, whichever period is the longer, shall convey on demand to the said Trustee or order by quitclaim deed or assignment without warranty of title or right to convey all flowage rights, water rights, easements, rights of way, flumes, pipe lines, canals, dams, diversions, tunnels, causes of action now owned by said District, and all real and personal property and other property of a like nature now owned by said District and which were purchased by the issuance of the bonds mentioned and described above or otherwise but excepting the District seal, minute and other books, assessment rolls, resolution book, stationery and funds raised or to be raised for the purpose of carrying out this plan and governing the District, and the cause of action and any proceeds therefrom of said District against Collins Pine Co., No. 6082.

The foregoing items shall be by way of example

only and not exclusive, it being the intention of the parties that all property both real and personal and all other rights or assets of any kind or character and not heretofore excepted which are now owned by said District as a result of the construction and operation of the Irrigation System purchased by the issuance of the bonds and warrants listed and described above herein or otherwise, shall be conveyed to the Trustee.

The Trustee agrees to execute a quitclaim deed to any landowner relieving his land of debt as herein provided quitclaiming unto said landowner all easements acquired pursuant to this paragraph over the lands of such landowner so relieved of [66] said debt. The form of deed attached hereto and marked Exhibit "C" contains this clause. Said quitclaim, however, is not intended to relinquish any interest in any main, lateral or canal.

III.

All payments made to said Trustee as Trustee for all the creditors of said District including bondholders, judgment holders, warrant holders, and coupon holders under this plan, and the net proceeds received by him from the sale or rental of any lands or property acquired by him by deed or otherwise from the District or by foreclosure of any mortgage or deed of trust held by him (after deducting taxes, operating expenses, and capital charges in connection with such land) shall be deposited by the said Trustee forthwith in the First

National Bank in Turlock, Turlock, California, and from such moneys (excepted as provided in paragraph III hereof) so deposited the First National Bank shall deduct:

I. All its reasonable charges and expenses, including depositary fees.

II. A reasonable compensation for the services of Trustee in the negotiation of the contract of composition and in the liquidation of the assets to be received by him, which compensation shall be fixed by the Court, and also his reasonable costs and expenses, including assessments or other payments payable to the District hereunder.

Provided, that the amount deducted by said First National Bank in Turlock with respect to all of the matters referred to in items I and II above shall not exceed 15 per cent of the first \$100,000 received by said First National Bank (including in said sum of \$100,000 any amounts received by or for the account of the settlement made with Tule Irrigation District, pursuant to the agreement between Tule Irrigation District and the Trustee made contemporaneously herewith) nor more than 50 per cent of any additional sums received by said First National Bank over and above said first \$100,000.00 (whether received by or for the account of Baxter Creek Irrigation District or Tule Irrigation District [67] pursuant to this agreement of composition or said agreement of composition made con-

temporaneously herewith in connection with said Tule Irrigation District), and

III. The amounts of the Balance of Expense Assessment referred to in Schedule B as "Bal:Exp:Assess:" as to those parcels affected thereby shall be paid to the Treasurer of said District for the purpose of carrying out this plan when said parcels or any of them affected thereby are deeded to the Trustee and/or when the owners of said parcels or any of them redeem said parcels pursuant to this plan. The owners of each and every parcel listed in Schedule B for which no sum is listed in column "Bal: Exp: Assess:" have heretofore paid their expense assessment to the District Treasurer as shown by his official record book for the purpose of carrying out this plan and the said Bank shall also pay said District the further sum of \$194.00 to help cover the District's expenses in carrying out this plan.

Provided that the amounts received by the First National Bank in Turlock from the source of payment referred to in Schedule B as Balance of Expense Assessments as set forth in Schedule B shall be held separate and apart from all other moneys, and shall be accounted for by the First National Bank as provided in said Paragraph III; and shall be disbursed only from the moneys collected from such excess assessments and not otherwise.

And shall then divide the balance remaining between the Non-Depositing Creditors and the said

Trustee in accordance with their proportionate interests therein as hereinafter more definitely provided, provided that the amounts payable to said Trustee on behalf of the Bondholders Committee shall be transmitted to the Anglo California National Bank in San Francisco, for account of the Committee for the holders of bonds and coupons, and judgments thereon.

That said First National Bank in Turlock shall pay the Non-Depositing Creditors and the Trustee from time to time on demand their respective shares of the mony so received as hereinafter determined. Provided, however, that before any Non-Depositing Creditor or the Trustee shall be entitled to receive any money from said First National Bank in Turlock, they or he must deliver to said First National Bank any evidence of indebtedness of the [68] District held by them or him, whether it be bonds, coupons, warrants or judgments and if the evidences of indebtedness be a judgment, or a pending and uncompleted suit or action against said District based upon bonds, coupons, warrants, or other judgments, an executed satisfaction of said judgment must be delivered together with the bonds, coupons, and warrants upon which the judgment and the suit or action are based and a dismissal with prejudice of said suit or action must be filed, provided that in the event that any Non-Depositing Creditor shall fail and neglect to deposit his bonds, coupons, warrants and judgments and execute satisfactions of said judgments and shall fail to execute

and file dismissals with prejudice as provided above within twelve months after the interlocutory decree becomes final he shall be deemed in default and forfeit the right to make any claim and the District's debt and obligation to said creditor shall be deemed discharged and liquidated in full and the amount that would have been payable to such defaulting creditor shall go back into the fund in the hands of the First National Bank in Turlock for redistribution to the other creditors. The Court may make provision for the payment of lost bonds, coupons, or warrants upon due proof of ownership and title.

For the purpose of determining the respective shares of the Trustee and the various Non-Depositing Creditors the following arbitrary schedule shall be used by the First National Bank in Turlock. [69]

I.

Half of the distribution from the composition shall be deemed paid on account of principal, and half on account of interest. The bonds and coupons, however, upon which judgments were rendered shall be surrendered for cancellation.

II. The Bonds and Coupons

Since the amount of interest now outstanding upon the bond issue is approximately equal to the face amount of the bonds outstanding and all bonds have matured, the amount of the bonded indebtedness to be used as the basis of distribution shall be

the amount of the outstanding bond issue; one-half of the distribution made from the composition shall, however, be deemed in payment of interest and one-half in payment of principal.

Provided, further, however, that should it appear that any coupons have been detached from the bonds to which they are appurtenant and are in separate ownership, the respective shares of the holder of the bond and the coupons shall be determined upon the basis of distribution of 50% to the bond and 50% to the coupons. The 50% allotted to the coupons shall be divided between the holders of the coupons in proportion to the number of coupons held by each owner. It is understood that the Trustee and depositary shall reduce any distribution to any bondholder whose bond has missing coupons by an amount to be determined as in this paragraph indicated.

III. Warrants

That since the amount of interest upon the outstanding [70] warrants is approximately equal to the face amounts of said warrants, the amount to be used in computing the share of said warrants shall be a sum equal to the face value of the warrants; half of the distribution from the composition to the holder of a warrant shall be deemed in payment of interest, and half in payment of principal.

IV.

It is further understood and agreed that whenever all lands in the District have been released

from liability for the bonds, coupons and warrants issued by the District and the judgments thereon against said District then the First National Bank in Turlock shall be authorized to deliver all of the bonds, coupons and warrants and judgments, together with the satisfactions of said judgments, bonds, coupons and warrants deposited with it to the District for cancellation and satisfaction and it is further understood and agreed that during the time this plan is in operation the warrants, judgments, bonds, and/or coupons now on deposit or which may hereafter be deposited with the First National Bank in Turlock pursuant to this plan shall be held by said First National Bank in Turlock in escrow and shall not be taken from said escrow except by agreement of the parties hereto.

V.

Individual landowners may make their offer to pay pursuant to the terms of paragraph (I) hereof, either to the said Trustee personally at Turlock, California, and/or to such persons as he may designate at Susanville, California, or Turlock, California, for the account of said Trustee, subject to escrow fees, if any.

VI.

Whenever land has been released from the obligation of coupons, bonds, warrants and judgments pursuant to Paragraph (I) hereof, the said Trustee shall make, execute, and deliver to the owner of such land a release substantially in the form of Ex-

hibit "C" hereto attached, which release shall be acknowledged [71] so that it may be recorded in the records of the County of Lassen.

VII.

It is further agreed that no segregation of the separately priced parcels shown in Exhibit "B" will be accepted and releases will only be executed for any entire parcel so separately described in Exhibit "B".

No mistake as to the name or identity of the person or persons alleged to be the owner or owners of the tracts in Schedule B and no mistake in the description of any of the tracts shall invalidate this agreement or void the consideration therefor. The United States District Court shall have the power to make all necessary corrections as to the aforementioned matters after being advised by competent evidence and satisfied as to the true facts.

If it should develop that any of the tracts in whole or in part are not subject to assessment to pay the aforementioned indebtedness of said District to be liquidated and discharged by this agreement and plan, such fact shall not invalidate this contract or void the consideration therefor.

VIII.

After all the bonded, warrant, coupon, interest, and judgment indebtedness of said District has been satisfied pursuant to the terms of this agreement and plan and the Orders of the United States

District Court said Trustee in his representative capacity as the representative of the aforementioned creditors of said District shall execute a general release to said District of any claim for said indebtedness against said District and against any and all of the lands within said District and/or liable for assessment to pay said indebtedness. Such release shall be acknowledged so that it may be recorded in the records of the County of Lassen. [72]

IX.

It is further agreed that, if for any reason this contract should not be approved by the U. S. District Court or upon appeal as provided in Paragraph II, Sec. (e) hereof, then it shall be void and of no effect and not binding on the parties hereto.

X.

Whenever the word "judgment" or "judgments" is used herein, it is intended to mean judgments upon bonds, coupons, or warrants and upon judgments based upon bonds, coupons and/or warrants.

It is the intention of the parties to this agreement and plan that all the District's bonds, coupons, warrants and judgments against said District are to be liquidated, discharged, paid and satisfied pursuant to the terms of this plan and orders of the United States District Court and that no mistake contained herein as to the amounts of said debts and obligations or any of them shall invalidate this contract or void the consideration therefor.

In Witness Whereof, the said W. Coburn Cook has hereunto set his hand the day and year first above written, and the Baxter Creek Irrigation District has caused these presents to be executed and its seal hereto attached by its President and Secretary thereunto duly authorized, the day and year first above written.

/s/ W. COBURN COOK,
Trustee,
Baxter Creek
Irrigation District.

[Seal of Baxter Creek Irrigation District]

By H. J. CLARK,
President.

By FERN S. OHMAN,
Secretary. [73]

Supplement to Baxter Creek Irrigation District (Cont'd)

If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit "B".

Plat No.	Owner	All M.D.B. & M. Description	Acres	Amount	Bal.		Total Amount
					Exp.	Assess	
1.	Bailey, Lenora	Beginning Southwest corner NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 23, Twp. 28 N., Range 13 East, MDB&M; Thence north 46 degrees east 360 feet; thence north 30 degrees west 200 feet to the place of beginning; thence north 30 degrees west 890 feet; thence north 60 degrees 45' East 730 feet to the county road; thence south 28 degrees 30' east along the county road 755 feet more or less; thence south 50 degrees 46' west 840 feet to the place of beginning.	18	\$ 57.00	\$ 1.68		\$ 58.68
2.	Bailey, Lenora	Beginning at the southwest corner of the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 23, Twp. 28 N., Range 13 E; thence one-fourth mile east; thence north 331 feet to the county road; thence north 28 degrees 30' west along	19	342.00	10.05		352.05

Plat No.	Owner	All M.D.B. & M. Description	Acres	Amount	Bal. Exp. Assess	Total Amount
		county road 815 feet more or less; thence south 50 degrees 46' west 840 feet more or less; thence south 30 degrees east 200 feet; thence south 46 degrees west 360 feet to the place of beginning.				
13.	Farrell, Jas. M. and Amy	Beginning at the southeast corner of Section 25, Township 28 N., Range 13 E; MDB & M; thence north 1125 feet; thence southwesterly 1814 feet to a point on south line of Section 25; thence east 884 feet to the place of beginning.	8	144.00	4.23	148.23
17.	McRorey, George F. and Rachel	Beginning at the quarter section corner between sections 14 and 23, Twp. 28 north, range 13 east, MDB & M, running thence south $\frac{1}{2}$ mile; thence west 600 feet; thence south 30 degrees east 820 feet; thence north 60 degrees east 532 feet; thence south 30 degrees east 59 feet; thence north 60 degrees east 1580 feet; to the county road; thence north 28 degrees 30' west along the	100	355.00	10.44	365.44

Plat No.	Owner	All M.D.B. & M. Description	Acres:	Amount	Bal. Exp. Asses.	Total Amount
21.	Stiles Estate May Florence, c/o Dermott Stiles	county road 42 chains; thence north 53 degrees east 380 feet; thence north 13 chains to the northeast corner of the NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23; thence west $\frac{1}{4}$ mile to the place of beginning.	533.58	4887.53	143.69	5031.22
		Commencing at the northeast corner of Sec. 26, Twp. 28 N. Range 13 E. MDB & M, thence running south $\frac{1}{2}$ mile, thence east $\frac{1}{2}$ mile, thence south $\frac{1}{2}$ mile, thence west $\frac{1}{4}$ mile, thence south $\frac{1}{2}$ mile, thence east $\frac{1}{2}$ mile, thence north $\frac{1}{2}$ mile, thence east $\frac{1}{4}$ mile, thence north $\frac{3}{8}$ mile more or less to the shore line of Honey Lake, thence following the shore line in a general northerly direction to a point where the north line of Section 25 intersects the shore line of Honey Lake, thence west along said section line 2 chains to the southeast corner of the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 24, thence southwesterly in a direct line to the southeast corner of				

Plat No.	Owner	All M.D.B. & M. Description	Acres :	Amount	Bal. Exp. Asses.	Total Amount
23.	Zeitler, Lval and Cathleen	NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 25, thence north $\frac{1}{4}$ mile, thence west $\frac{1}{4}$ mile to the place of beginning. Excepting therefrom that portion described as follows: Beginning at the southeast corner of Section 25, Twp. 28 N., Range 13 E; MDB & M; thence north 1125 feet; thence southwesterly 1814 feet to a point on south line of Section 25; thence east 884 feet to the place of beginning.	22	73.00	2.15	75.15
		Beginning at the southeast corner of the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 23, Twp. 28 N., Range 13 E., MDB&M. Running thence north 46 degrees east 360 feet; thence north 30 degrees west 1090 feet; thence south 60 degrees west 760 feet; thence south 30 degrees east 1150 feet to the Wilbur Garden; thence north 63 degrees east 400 feet to the place of beginning.				

Plat No.	Owner	All M.D.B. & M. Description	Acres	Amount	Bal. Exp. Asses.	Total Amount
6.	Clark, H. J. and Lurley	N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$, N $\frac{1}{2}$ of S $\frac{1}{2}$ of NW $\frac{1}{4}$, of Sec. 1; N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 2, Twp. 28 N., Range 13 E.	90	\$225.00	\$6.61	\$231.61

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR
INSTRUCTIONS AND ORDER

To Baxter Creek Irrigation District and to Franklin A. Dill, Esquire, its Attorney:

You and each of you will please take notice that on Monday, the 4th day of November, 1946, at the hour of ten o'clock a.m. of that day, or as soon thereafter as counsel can be heard, W. Coburn Cook, trustee herein, will apply to the court above named for instructions pertaining to his duties herein and for appropriate orders in connection with such instructions, all as set forth and proposed in the annexed application for instructions and order.

Dated October 24, 1946.

W. COBURN COOK,
Trustee.

[Endorsed]: Filed Oct. 26, 1946. [77]

[Title of District Court and Cause.]

APPLICATION FOR INSTRUCTIONS
AND ORDER

W. Coburn Cook, trustee in this matter, requests this Honorable Court to instruct him relative to the following matters:

1. A controversy has arisen as to whether certain lands which the Trustee contends are subject

to the indebtedness herein, it appearing to be the contention of the landowners that said lands have been excluded from the district, are in fact subject to said indebtedness and therefore subject to the provisions of the composition agreement herein, and it appears that said controversy cannot be determined unless either the landowners in question bring an action in the appropriate court to determine said matters or the trustee brings such action, and the trustee desires to commence an action against the landowners in question for determination of said matter and the trustee requests this court to instruct him in that regard and authorize him to commence an appropriate action for determination of said matters.

2. Certain lands in said district were at the time of the filing of the proceedings herein considered by the parties to be not subject to assessment for the indebtedness which is the [78] subject of the composition proceedings for the reason that they were considered to be lands of the United States and therefore not subject to such assessment but the trustee contends that said lands are subject to the provisions of the Smith Act of the Congress of the United States which under certain circumstances makes them liable for such assessments, and therefore said lands should not be relieved from the obligation to pay the indebtedness herein. The trustee is uncertain whether a proceeding should be undertaken to embrace said lands within the terms of the composition agreement or whether said lands should remain subject to the indebtedness and assessments

levied thereon and title subsequently obtained if such assessments are not paid transferred to the trustee and the trustee requests instructions in this regard as to what proceedings should be had, it being his position that the latter course is the appropriate one.

Wherefore, W. Coburn Cook as trustee herein requests this Honorable Court to instruct him in these matters and to make the appropriate order in accordance with the claims and recommendations of the trustee.

Dated October 24, 1946.

W. COBURN COOK,
Trustee.

STATEMENT RELATIVE TO THE
ABOVE APPLICATION

Reference is made to Section 20 of the Interlocutory Decree herein where it is provided that the trustee herein may apply to the Court for an order to carry out and make effective the interlocutory decree and Section 26 providing that the owners of tracts may take proceedings to determine the question of whether their lands are subject to the terms of the composition and Section 27 providing that the Trustee may apply to the Court for orders of assistance and for instructions upon notice to the petitioner.

W. COBURN COOK,
Trustee.

[Endorsed]: Filed Oct. 26, 1946. [79]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 4th day of November, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Roger T. Foley,
District Judge.

[Title of Cause.]

ORDER RE APPLICATION FOR INSTRUCTIONS

The application for instructions and order came on regularly this day to be heard. Franklin A. Dill, Esq., was present for and on behalf of the District. W. Coburn Cook, Trustee of said District, was present in proper person. After hearing Mr. Dill and Mr. Cook, it is Ordered that the application for instructions and order be submitted on briefs in 10-10-10 days. [80]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, on Monday, the 17th day of March, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Roger T. Foley,
District Judge.

[Title of Cause.]

ORDER ON OPINION AND ORDER

The application for instructions and order having been heretofore heard and submitted, being now fully considered, it is, in accordance with an opinion and order heretofore signed herein on March 13, 1947, and filed this day, granted in part, and denied in part. [81]

[Title of District Court and Cause.]

DECISION ON APPLICATION FOR INSTRUCTIONS AND ORDER

The above entitled proceeding is under the Municipal Bankruptcy Act of the United States, Title 11, Secs. 401-403, U.S.C.A. The Baxter Creek Irrigation District is an irrigation district organized under the laws of the State of California and is a public agency.

On January 3, 1946, Honorable Martin I. Welsh, Judge of the above entitled Court, entered an Interlocutory Decree confirming a plan of composition.

On October 26, 1946, W. Coburn Cook, trustee in this matter, filed his "Application for Instructions and Order" praying that the Court authorize him to commence appropriate actions or take other appropriate proceedings for the purpose of determin-

ing whether certain lands may be subject to assessment for the indebtedness which is the subject of these composition proceedings. The Baxter Creek Irrigation District and land owners H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey and Mr. and Mrs. G. A. Blickenstaff (successors in interest to Lyman Dermott Stiles) and James M. Farrell and Amy L. Farrell oppose the granting of the said "Application for Instructions and Order."

The trustee in his reply brief suggests that there are "* * * two parts to this matter. The first part relates [82] to the inclusion or exclusion from the boundaries of the district of certain lands which the Federal District Court held in *Pueblo Trading Co. vs. Baxter Creek Irrigation District No. 4195L* in this Court, reported in 61 Fed. Supp. 586, to have been excluded from the district. * * *"

In the action *Pueblo Trading Co. v. Baxter Creek Irrigation District*, 61 F. Supp. 586, H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey and Lyman Dermott Stiles filed a petition for an order to show cause for relief from the assessment, the subject matter of the action. Mr. and Mrs. G. A. Blickenstaff are successors in interest to the above named Lyman Dermott Stiles. In that action Judge Welsh held as follows:

"It is therefore held that the lands of the aforesaid petitioners herein, and each of them, are not located within the boundaries of the Baxter Creek Irrigation District, defendant in

above entitled action, are not subject to the indebtedness of said defendant, and are not liable or subject to assessment by said defendant, the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector, Treasurer, or any other officer of said County, or any of them, to pay the judgment rendered in the above entitled action; and

“It is hereby further ordered that the order heretofore made herein on the 26th day of September, 1944, requiring that the Board of Supervisors and officers of Lassen County, California, prepare an assessment roll of said lands and assess said lands for the payment of the judgment in the above entitled action be amended so as to exclude the property described in Exhibit ‘A’ attached to the petition filed on the 2nd day of April, 1945.”

The decision of Judge Welsh in *Pueblo Trading Co. v. Baxter Creek Irrigation District* is an adjudication pronounced upon the status of the property of the above named owners in its relation to the Baxter Creek Irrigation District and is a holding by a competent tribunal that said property is not included within the Baxter Creek Irrigation District and such adjudication is binding on the irrigation district and any person asserting rights through, or as successors in [83] interest to, or by virtue of the irrigation district. The above named land owners should not again be required to meet the expense and inconvenience of newly instituted proceedings to determine the same questions de-

cided by Judge Welsh in their favor in the Pueblo Trading Co. case, *supra*.

What the trustee refers to as the other part of the controversy will now be considered.

Title 43, Sec. 621, U.S.C.A. reads as follows:

“Subjection of Lands in State Irrigation District to State Laws Generally. When in any State of the United States under the irrigation district laws of said State there has, prior to August 11, 1916, been organized and created or shall thereafter be organized and created any irrigation district for the purpose of irrigating the lands situated within said irrigation district, and in which irrigation district so created or to be created there shall be included any of the public lands of the United States, such public lands so situated in said irrigation district, when subject to entry, and entered lands within said irrigation district, for which no final certificates have been issued, which may be designated by the Secretary of the Interior in the approval by him of the map and plat of an irrigation district as provided in section 623 of this chapter, are hereby made and declared to be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes, to the same extent and in the same manner in which the lands of a like character held under private

ownership are or may be subject to said laws: Provided, That the United States and all persons legally holding unpatented lands under entry made under the public land laws of the United States are accorded all the rights, privileges, benefits, and exemptions given by said State laws to persons holding lands of a like character under private ownership, except as hereinafter otherwise provided: Provided Further, That this chapter shall not apply to any irrigation district comprising a majority acreage of unentered land."

If the trustee believes that there are public lands of the United States within the district liable for a portion of the indebtedness of the district, he should be permitted to take such proceedings as he may deem proper to obtain a determination of such liability and to subject such public lands to the same if found to exist.

The trustee is authorized within thirty (30) days from notice of this Decision, or within any such further time as may [84] be allowed by the Court, to institute such actions or proceedings as he may deem proper for the purpose of determining whether or not public lands of the United States situated within the said irrigation district should be subject to assessment for the indebtedness which is the subject of the composition proceedings, or for any other purpose which may be within the purview of the Interlocutory Decree filed herein January 3, 1946.

The application of the trustee insofar as it relates

to the land referred to in the case entitled Pueblo Trading Co. v. Baxter Creek Irrigation District, 61 F. Supp. 586, is denied.

The application of the trustee insofar as it relates to public lands of the United States situated in said irrigation district is granted.

Dated: This 13th day of March, 1947.

ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 17, 1947. [85]

[Title of District Court and Cause]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT (UNDER RULE 75)

Notice is hereby given that W. Coburn Cook, as Trustee appointed by the court in this matter, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the "Decision on Application for Instructions and Order" entered in this action on March 17, 1947.

This appeal is from the whole of said Decision on Application for Instructions and Order except that part thereof which grants the application of W. Coburn Cook, Trustee, in so far as it relates to public lands of the United States situated in said irrigation district.

The appellant is W. Coburn Cook as trustee ap-

pointed by the court in said matter as representing all of the creditors of the Baxter Creek Irrigation District herein.

The respondents are the Baxter Creek Irrigation District and the landowners H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal [86] Zeitler, George McRorey, Rachel McRorey, Mr. and Mrs. E. A. Blickenstaff (successors in interest to Lyman Dermott Stiles) and James N. Farrell and Amy L. Farrell.

Dated: April 18, 1947.

W. COBURN COOK,

As Trustee appointed by the
Court herein. In Propria
Persona.

[Endorsed]: Filed Apr. 21, 1947.

EXHIBIT 29

Land in (Exhibit) Schedule B of Plan
Baxter Creek Irrigation District

Tracts	Acreage	Refund to Dist.	Redemption Value
1-82	9,236.75	\$ 781.15	\$57,514.45
4, 5, 7, 11, 15, 16, 18, 19, 20, 21 (Supplemental) ..	1,163.00	120.52	4,980.52
1, 2, 13, 17, 21, 23, 6 (on pages 10 & 11)	790.58 (a)	178.65	6,262.38 (a)
	<hr/>	<hr/>	<hr/>
	11,190.33 (b)	\$1,080.52 (c)	\$68,757.35

(a) Tracts 1, 2, 17, 21, 23 & 6 were held not to be in said District by the United States District Court, Northern District of California, North-

ern Division in Pueblo Trading Co. v. Baxter Creek Irrigation District No. 4195 L so should be disregarded and not taken into consideration pursuant to the plan. (See 61 Fed. Supp. 586.) Tract 13, was also held not to be within said District pursuant to Stipulation and Order dated October 9, 1945, in Pueblo Trading Co. Case 4195 L.

- (b) This does not include 20 acres of Government land not subject to assessment.
- (c) This represents certain unpaid assessment money which together with \$194.00 is to be returned to the District to help pay expenses of proceeding. (See III page 10 A of Plan.)

RECAPITULATION

	Acreage	Refund to Dist.	Redemption Value
	11,190.33	\$1,080.52	\$68,757.35
((a) not subject to assessment)	790.58	178.65	
	<hr/> 10,399.75	<hr/> (\$ 901.87	<hr/>
		(e) { 194.00	1,095.87
		<hr/>	<hr/>
			\$67,661.48
			(a) 6,083.53
			<hr/>
Total Redemption Value for Creditors.....			\$61,577.95

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 95 pages,

numbered 1 to 95, inclusive, contain a full, true and correct transcript of certain records and proceedings in the Matter of the Baxter Creek Irrigation District, No. 10750, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designations of Contents of Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Sixteen and 90/100 (\$16.90), and that the same has been paid to me by the attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 16th day of May, A. D. 1947.

[Seal] C. W. CALBREATH,
 Clerk.
By /s/ F. M. LAMPERT,
 Deputy Clerk. [96]

[Title of District Court and Cause]

EXCERPT FROM PROCEEDINGS OF
FRIDAY, DECEMBER 7, 1945

(Book 393, pages 900 to 904, Reporter's notes)

Counsel Appearing:

FRANKLIN A. DILL, Esq.,

For petitioner Baxter Creek Irrigation
District.

W. COBURN COOK, Esq.,

For Bondholders' Protective Committee.

(The following proceedings occurred after the taking of oral testimony and during the introduction of documentary evidence:)

Mr. Dill: I would also like to call the Court's attention to one of the provisions in the plans in both of the districts where the trustee agrees to reimburse each district the following sums: the Tule District 306 and the Baxter 194 their expenses of this plan. The basis of that was for a certain flume that the district had the opportunity to sell but rather than selling it they left it intact so that it could be used if this plan went through by the trustee.

I would like to call attention to one provision in the Baxter Irrigation District—in their plan—in which there are certain parcels of land that are listed and the redemption values given, and at the top of this schedule there is a provision in the plan that if the United States District Court holds that these lands are not within the boundaries of the district they will not be redeemed.

The basis of this provision, of course, was that in the *Pueblo v. Baxter Creek Irrigation District* case, No. 4915—you no doubt remember the hearing that Mr. Cook and myself had, and you made certain orders in that case. At this time, your Honor, I would like to introduce in evidence those orders that were made.

Mr. Cook: To which I wish to object. This point, if your Honor please, resolves itself this way: When these contracts were signed, Exhibit B containing

the land schedules were not attached to the contract—they were subsequently attached—and I don't believe I was aware of the statement on there that the District Court would determine whether this group of land should be excluded or not.

It is true that in the Pueblo Trading Company case your Honor decided that they were not subject to assessment and of course the Pueblo Trading Company is bound by that, but I am appearing in this case today for the Bondholders' Protective Committee. They were not parties to that and I rather question whether the District Court can determine the question of whether so far as the district is concerned these lands are excluded lands.

I object to the introduction of the judgment in the Pueblo Trading case on behalf of the Bondholders' Protective Committee. It is not binding upon them.

I suggest, however, that it might be proper for the Court here to make some suggestion or order as to how this matter should be determined. I would suggest that the Superior Court in Lassen County is probably the proper court to determine that question, and that the Trustee in the decree might be directed to either quit-claim to these parties within a period of 90 days or else to bring an action in the Superior Court of that county to determine whether they are in the district or not. But so far as this proceeding is concerned, I object to the introduction of this judgment on the ground that it is not binding upon the Bondholders' Protective Committee.

Mr. Dill: Your Honor, in further support of my

offer of proof, I state the following: first, that both plans, Tule and Baxter, have a provision therein—they speak for themselves—but any land owner has the right to contest the question of whether their land was within the boundaries—not necessarily applying to these six—any one of them can come into court if they care to.

Mr. Cook: That is correct.

Mr. Dill: And that provision was agreed to by Mr. Cook.

Mr. Cook: That is right.

Mr. Dill: Now, in line with Mr. Cook's statement that as to the last plan that when he signed it the schedule was not attached, I believe he is correct. However, to get the full picture you have to go back, that there were several plans proposed through our negotiations. One plan was adopted July 9th, if I remember right, 1945, copies of which were sent—completed copies to Mr. Cook—which I have in my suitcase if the Court wishes to see them, to which all the schedules were attached. The only changes made further in the plan was that one parcel was changed in application and certain other provisions as to Mr. Cook's fees and certain other things.

I submit that the trustee was aware of the schedules of the plan. It was clearly understood. This is a factual consideration.

Further particularly I submit these orders are binding on everybody. If Mr. Cook would like to submit some authorities—I say in any case it is binding upon the Pueblo Trading Company and the

Pueblo Trading Company is before the Court today. They have filed their claims and have consented to them.

But rather than to labor the point with the Court I offer these papers, and if the Court would like to reserve its ruling it will be agreeable with me.

Mr. Cook: I would like to suggest this further and that is that the Pueblo Trading Company action was not brought on behalf of any other creditor; that even if I did have knowledge as trustee of these proceedings and the like, that there are certainly other creditors here who can come in and appeal. What I am trying to avoid is the necessity, if it should be deemed that the Court would follow the Pueblo Trading ruling and rule that these lands are out, of putting some creditors in the position of appealing, notwithstanding this whole plan they are talking of really does not involve the plan, because the redemption values are set up. If they are not in the district they just don't have to redeem. They just don't have to do anything. Their title is clear. On the other hand, if they are in the district then the title is not clear.

And it just seems to me that that question can be determined, if your Honor feels it has to be determined in this Court, at a subsequent time on the application of these landowners themselves—Mr. Dill is not appearing for them here; he is appearing for the district—if they wish to apply to this court at some time for a determination on that, and then if there was an appeal it would involve just that collateral matter and not the whole plan.

I don't like to have this plan held up. I want it to go through, and I am pleading with the Court to deny the introduction of the evidence and to make some order that will permit any landowner to come in here and present his case at a later date regardless of the plan of composition determined to be fair and so forth, or else as I have suggested that I be directed either to quit-claim to these landowners within three months or to bring a suit to determine that they are in or out in the Superior Court of Lassen County.

That is what I ask.

Mr. Dill: Your Honor, I submit that that same provision was made in the Pueblo Trading Company case directing landowners to later come in and the land owners did come in and had a favorable ruling from the Court.

It is well understood that those lands were not to be considered a part of the plan, as counsel knows, and that is why they are set forth in a separate part of the ~~decree~~ *schedule*.

I would like for the record rather than laboring the point further to offer these——

The Court: I am going to suggest that you submit the matter on briefs.

Mr. Cook: Yes, and I am pleading with counsel further that he is laying the foundation for a further six months' delay in this case. He is here representing the districts and now he is taking the position of representing the landowners who have not even authorized him to appear. I hope we don't have to brief this matter. I want this plan to go

through without delay. The plan itself provides that any landowner can come in and ask to have any point determined.

And that is what—I don't see—Unless the Court orders the filing of briefs I would like to have the matter disposed of now, and I suggest to your Honor to deny the admission of this exhibit and make an order permitting any land owner to come in and apply to the Court for determination.

Mr. Dill: I don't want to delay this plan at all. From the time I was born these districts have been having trouble, just about, and if any one has the good faith and intent of having this plan go through properly and without any trouble I do; but I believe that these orders should be introduced. The district has made a determination themselves that the land was not in the district and that is why the district did not appear in the Pueblo Trading Company case. However, in an individual capacity I represented several land owners in that district before this court, as Mr. Cook well knows, and it was the intent all throughout that that was to settle the case.

I make the offer of the following documents anyway——

Mr. Cook: To which I object on the grounds stated.

Mr. Dill: Yes.

Mr. Cook: That is in the Baxter case only.

Mr. Dill: Well, that is the only one, yes.

The following documents in Pueblo Trading Company vs. Baxter Irrigation District:

Affidavit of service by mail of a notice—order of this present court dated August 27, 1945, and a notice by the Clerk of the entry of that order dated August 27th;

Stipulation dated—I mean filed October 3d;

An order filed October 3d, 1945;

Stipulation filed October 9, 1945;

An order as to the Farrell lands filed October 9, 1945;

Notice of entry of orders filed October 27, 1945.

The Court: You are offering these for identification?

Mr. Dill: I offer them as evidence.

The Court: They will be **admitted**.

(The documents referred to were marked
Baxter Irrigation District's Exhibit No. 30.)

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal] C. W. CALBREATH,
Clerk, District Court of the U. S., Northern District
of California.

/s/ By F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: Filed May 24, 1947.

Mr. Dill: I would like to introduce next in evidence in the Baxter Irrigation District case a general map outlining the boundaries of the district—as outlined on the Leon Blye Eagle Lake Project Map, a copy of which you are no doubt familiar with, having been introduced in the Pueblo Trading case, number 4195-L, by myself.

Mr. Cook: No objection.

The Court: Admitted.

(The map referred to was marked Baxter Exhibit No. 15.)

Mr. Dill: I would like to introduce in evidence summaries taken from Schedule B of the Tule Irrigation District disclosing the number of tracts and acreages and the redemption value as set forth now, and also a schedule or summary from schedule B from the plan of the Baxter Irrigation District setting forth in detail the tracts, and so forth.

(The documents referred to were marked Baxter Exhibit No. 29.)

Re: Baxter Creek Irrigation District—No. 10,750
Bk.—December 7, 1945.

(The following proceedings occurred after the introduction of documentary evidence—Book 393, page 908, Reporter's notes:)

Mr. Dill: Your Honor, if it is agreeable with the court, and I believe counsel concurs, if we could have a ten-minute recess to check a few matters and perhaps this case can be submitted.

The Court: Yes. Recess for a short time.

(Recess.)

Mr. Dill: Your Honor, there has been some discussion about the offer of proof that I made of certain records of the Pueblo Trading Company and I have been authorized by the Baxter Creek Irrigation District to withdraw those orders because perhaps of some possible question of appeal from those orders and rather than hinder the approval of this plan, if agreeable with the Court, I wish to withdraw them. However, on these conditions and representation to the Court: that by doing so we do not waive our rights or acknowledge that the land is ~~not~~ within the Baxter Creek Irrigation District.

Mr. Cook: So agreed.

Mr. Dill: And furthermore I have the right and I have I think the duty imposed by law in my profession of counsel, since I represent certain landowners of that district, that we do not waive any rights as to that, because I appear ~~for~~ⁱⁿ the Pueblo Trading Company, although my term of employ-

ment in that case is ended and I am under no obligation one way or the other, but I feel it is my duty to make my position clear on that, but in order not to hinder the approval of this plan I will agree to that.

Mr. Cook: Baxter Exhibit 30 is withdrawn.

Mr. Gerald Wallace: Without prejudice?

Mr. Dill: Yes, without prejudice ~~in~~ⁱⁿ any other proceeding. State or otherwise, on behalf of the District.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal] C. W. CALBREATH,
Clerk, District Court of the U. S., Northern District
of California.

/s/ By F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: Filed May 27, 1947.

[Endorsed]: No. 11632. United States Circuit Court of Appeals for the Ninth Circuit. W. Coburn Cook, as Trustee, Appellant, vs. Baxter Creek Irrigation and the Landowners, H. J. Clark, Lurley Clark, Leonora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Mr. and Mrs. E. A. Blickenstaff and James N. Farrell and Amy L. Farrell, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed May 17, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11632

W. COBURN COOK, as Trustee for the Creditors
of Baxter Creek Irrigation District,

Appellant,

vs.

BAXTER CREEK IRRIGATION DISTRICT,
et al.,

Appellees.

STATEMENT OF POINTS ON APPEAL

Appellant states that the points upon which he intends to rely on the appeal in this cause and the er-

rors which he avers occurred in the hearing and determining of this decision and the order appealed from are the following:

1. The court erred in denying the application of appellant to commence certain actions or proceedings for the purpose of determining whether certain lands owned by H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey and Mr. and Mrs. G. A. Blickenstaff (successors in interest to Lyman Dermott Stiles) and James M. Farrell and Amy L. Farrell may be subject to assessments for the indebtedness which is the subject of the composition proceedings.

2. The court erred in holding and determining that the decision in the case of Pueblo Trading Co. v. Baxter Creek Irrigation District, 61 Fed. Supp. 586, was a determination of the issues herein or that the decision therein is binding on the irrigation district and any persons asserting rights through or as successor in interest to or by virtue of the irrigation district, or binding upon the trustee herein or the creditors he represents herein, and erred in finding that the court did or could in said case determine as to the trustee that the lands of the individual respondents H. J. Clark, et al., are not included within the Baxter Creek Irrigation District.

3. The court erred in giving any consideration to the matters determined in or the record in the said case of Pueblo Trading Co. v. Baxter Creek Irrigation District, Number 4195L in said court inasmuch as the decision and proceedings therein were no part of the record in the instant case.

Dated: May 27, 1947.

/s/ W. COBURN COOK,

Trustee for the Creditors of Baxter Creek Irrigation District.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND FOR PRINTING

The appellant designates as those parts of the record as necessary for the consideration of the points upon which the appellant intends to rely in this appeal and for printing herein the following:

1. Agreement between Baxter Creek Irrigation District and W. Coburn Cook which constitutes the Plan of Composition except Exhibits, if any, attached thereto.

2. Application for Instructions and Order dated October 24, 1946, and Notice.

3. Decision on application for instructions and order filed March 17, 1947.

4. Findings of Fact and Conclusions of Law.

5. Interlocutory Decree.

6. Minute Order of November 4, 1946, relative to Application for Instructions.

7. Minute Order of Court dated March 17, 1947, Granting Application for Instructions in Part.

8. Notice of Appeal to Circuit Court of Appeals for the Ninth Circuit.

9. Petition for Confirmation of Composition excepting all Exhibits attached thereto other than Exhibit A, Division A-1, Exhibit A, Division B, and page 5 of Exhibit C, including the title of said Exhibit.

10. Exhibit 29 of the Bankrupt introduced at the hearing on December 7, 1946, for confirmation of the Plan of Composition.

11. The following portions of the Statement of Bondholders' Protective Committee, namely: The Heading and paragraph numbered 1 and the sub-head therein which reads: "Statement of Expense of Committee," together with item number 5 thereunder and the closing paragraph and signature.

12. That part of Exhibit B attached to the Agreement which is called "Supplement to Baxter Creek Irrigation District."

13. Reporter's Transcript of portions of testimony.

14. Statement of Points on Appeal (in Circuit Court).

15. This designation.

16. The following may be printed although not considered necessary to consideration of the points involved, namely: Consents to plan of composition (omitting title of court and cause).

Dated: May 27, 1947.

/s/ W. COBURN COOK,

Trustee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF CONTENTS
OF RECORD ON APPEAL AND FOR
PRINTING

The appellees designate as those parts of the record in addition to those parts heretofore designated by the appellant as necessary for the consideration of the points upon which the appellant intends to rely in this appeal and for printing herein the following:

1. All of Exhibit 10 known as the Statement of Bondholders' Protective Committee except Exhibit "A" attached thereto which was not included in appellant's designation No. 11.

2. Consents to Plan of Composition omitting title of Court and cause referred to in appellant's designation No. 16.

Dated: June 6, 1947.

/s/ FRANKLIN A. DILL,
Attorney for Appellees.

(Affidavit of service by mail attached.)

[Endorsed]: Filed June 6, 1947.

No. 11,632

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

W. COBURN COOK, as Trustee,

Appellant,

VS.

BAXTER CREEK IRRIGATION DISTRICT and the
Landowners, H. J. CLARK, LURLEY CLARK,
LEONORA M. BAILEY, LYAL ZEITLER, GEORGE
MCROREY, RACHEL MCROREY, MR. AND
MRS. E. A. BLICKENSTAFF and JAMES N.
FARRELL and AMY L. FARRELL,

Appellees.

BRIEF FOR APPELLANT.

W. COBURN COOK,

Berg Building, Turlock, California,

Attorney for Appellant.

FILED

AUG - 1 1947

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No. 11,632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. COBURN COOK, as Trustee,

Appellant,

VS.

BAXTER CREEK IRRIGATION DISTRICT and the
Landowners, H. J. CLARK, LURLEY CLARK,
LEONORA M. BAILEY, LYAL ZEITLER, GEORGE
MCROREY, RACHEL MCROREY, MR. AND
MRS. E. A. BLICKENSTAFF and JAMES N.
FARRELL and AMY L. FARRELL,

Appellees.

BRIEF FOR APPELLANT.

JURISDICTIONAL FACTS AND PLEADINGS.

This proceeding is a petition for composition of debts of the Baxter Creek Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California approved March 31, 1897, and acts amendatory thereof. The proceeding is authorized under the provisions of Chapter IX of the Bankruptcy Act of 1898. (11 U.S.C.A., Secs. 401-404.)

The jurisdiction of this Court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The petitioner herein (appellee district) filed its petition for confirmation of composition September 17, 1945. (R. 2, 9.)

The other appellees are landowners whose lands it is claimed by appellant were within the boundaries of the Baxter Creek Irrigation District and subject to its debts, whether now within the district or excluded.

The appellant was designated and appointed Trustee for Creditors by the District Court by its interlocutory decree entered January 3, 1946 (R. 60, 61) and was directed to carry out the terms of the plan of composition and to apply to the Court for instructions. (R. 60.)

The appellant applied to the Court for instructions and an order for authority to commence a proceeding against the landowners who are appellees herein for the purpose of determining that their lands are subject to the assessment for the indebtedness involved in the composition proceeding and to determine whether the lands should be required to come within the terms of the composition agreement, or whether title should be obtained to said lands for nonpayment of the assessment. (R. 89-91.)

The application was heard before Honorable Roger T. Foley, United States District Judge, who on March 17, 1947, entered a decision denying the Trustee's ap-

plication and determining that the matter was *res judicata* in the case of *Pueblo Trading Co. v. Baxter Creek Irrigation District*, 61 Fed. Supp. 589. (R. 98.)

STATEMENT OF THE CASE.

Throughout this brief the Baxter Creek Irrigation District will be referred to as the "district" and the other appellees will be referred to as the "land-owners".

The proceeding is under the Municipal Bankruptcy Act of the United States, Title 11, Sections 401-403, U.S.C.A. The Baxter Creek Irrigation District is an irrigation district organized under the laws of the State of California and a public agency. The basis of the composition proceeding is a contract made between W. Coburn Cook, referred to as the Trustee, and the Baxter Creek Irrigation District on August 28, 1945. (R. 62.) On January 3, 1946, Judge Martin I. Welsh entered an interlocutory decree confirming the contract as a plan of composition. (R. 50, 61.)

In resumé of the plan of composition it may be stated that a Bondholders Protective Committee was formed June 1, 1926 (R. 17) representing some 79% of the creditors of the district. The committee pursuant to its authority entered into a contract with W. Coburn Cook (R. 18, 23) which agreement authorized Cook to negotiate a plan of composition.

The composition agreement which was negotiated by Cook with the district recited that the debts of the

district consisted of \$511,000 of interest bearing bonds and \$52,220.93 principal amount of warrants. (R. 62, 63.) The main provision of the composition agreement was that the landowners should individually be entitled to redeem their respective parcels of land at stated figures as set forth in an exhibit called Exhibit "B" (R. 65), and that upon default in such payment prior to April 24, 1947, the district would undertake to acquire title to all unredeemed lands and all other lands and convey the same to the trustee, together with all other assets and properties of the district except its actual books, seal and records. (R. 70, 71, 73.)

At the time the agreement was drawn it seems to have been assumed that certain lands belonging to the United States of America were not subject to assessment and these parcels were not included in the land to be redeemed. Also there was a certain block of land which had actually never been assessed and which was in private ownership. This block of land belonged to several landowners, the individual appellees or their predecessors herein, and their lands were separately listed in a schedule called "Schedule C" (R. 14, 84) which contained a notation: "If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'." Redemption figures were set forth opposite the names of the landowners and descriptions of the properties. The apparent reason for the non-assessment of these lands in years past was the assumption that they had been legally excluded from the boundaries of the district at a time when, if

excluded, they would not be liable to assessment for the debt of the district. It is in relation to these so-called excluded lands that this controversy arises.

Section 20 of the Interlocutory Decree (R. 58) provides:

“That this Court further hereby reserves the right and retains exclusive power and jurisdiction by appropriate order or orders hereafter entered to provide for and to carry out said Plan of Composition under and subject to the supervision and control of this Court and hereby specifically retains and shall have the exclusive jurisdiction of said cause and said Plan of Composition. That the debtor Baxter Creek Irrigation District or the Trustee may from time to time apply to this Court for such other order or orders as may be necessary to carry out and make effective this Interlocutory Decree and this Court hereby reserves and shall have full and complete jurisdiction of said Plan of Composition.”

Section 27 of the Interlocutory Decree (R. 60) provides:

“W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein and authorized to carry out the terms of the plan of composition, and he may apply to this Court for orders of assistance to that end or for instructions, upon notice to the petitioner.”

These two sections were the basis for the proceedings in the District Court as a result whereof this appeal is taken.

The trustee, acting on behalf of all creditors, deemed it his duty to commence a proceeding to determine, which the District Court had not done at the hearing on the plan of composition, whether the so-called "excluded" lands were subject to the indebtedness of the district and therefore should be embraced within the plan of composition or conveyed to the trustee, and also to determine whether the government lands referred to should be likewise considered and handled.

The application therefor was dated October 24, 1946 (R. 89) and was submitted to Honorable Roger T. Foley upon a minute order made November 4, 1946.

Judge Foley ruled on March 17, 1947:

1. That the decision of Judge Welsh in *Pueblo Trading Co. v. Baxter Creek Irrigation District* was an adjudication of the application here made relating to the privately owned lands. That it was binding on the irrigation district and any person asserting rights through or under the district.

2. That the trustee be permitted, however, to take proceedings to obtain a determination of the status of the government lands.

No appeal has been taken from ruling No. 2.

By so determining Judge Foley has held in effect that both applications were made *timely* and that the relief sought was *proper*, but held under item 1 that as to the so-called "excluded lands" the cause was *res judicata*. In so determining, Judge Foley stated:

"In the action *Pueblo Trading Co. v. Baxter Creek Irrigation District*, 61 F. Supp. 586, H. J.

Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey and Lyman Dermott Stiles filed a petition for an order to show cause for relief from the assessment, the subject matter of the action. Mr. and Mrs. G. A. Blickenstaff are successors in interest to the above named Lyman Dermott Stiles. In that action Judge Welsh held as follows:

“ ‘It is therefore held that the lands of the aforesaid petitioners herein, and each of them, are not located within the boundaries of the Baxter Creek Irrigation District, defendant in above entitled action, are not subject to the indebtedness of said defendant, and are not liable or subject to assessment by said defendant, the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector, Treasurer, or any other officer of said County, or any of them, to pay the judgment rendered in the above entitled action; and

“ ‘It is hereby further ordered that the order heretofore made herein on the 26th day of September, 1944, requiring that the Board of Supervisors and officers of Lassen County, California, prepare an assessment roll of said lands and assess said lands for the payment of the judgment in the above entitled action be amended so as to exclude the property described in Exhibit “A” attached to the petition filed on the 2nd day of April, 1945.’

“The decision of Judge Welsh in *Pueblo Trading Co. v. Baxter Creek Irrigation District* is an adjudication pronounced upon the status of the property of the above named owners in its relation to the Baxter Creek Irrigation District and

is a holding by a competent tribunal that said property is not included within the Baxter Creek Irrigation District and such adjudication is binding on the irrigation district and any person asserting rights through, or as successors in interest to, or by virtue of the irrigation district. The above named landowners should not again be required to meet the expense and inconvenience of newly instituted proceedings to determine the same questions decided by Judge Welsh in their favor in the Pueblo Trading Co. case, *supra*." (R. 94, 95, 96.)

Pueblo Trading Co. was one of the creditors of the Baxter Creek Irrigation District holding a relatively small amount of indebtedness. In an action in the United States District Court it obtained orders requiring the supervisors of the county to levy assessments upon the lands of the district, the board of directors of the district having ceased to act or exist and so having failed to levy such assessment. The facts are pretty well set forth in the decision of Judge Welsh which appears in the cited case of *Pueblo Trading Co. v. Baxter Creek Irrigation District*, 61 Fed. Supp. 586. This was all prior to the composition agreement or proceeding. A considerable quantity of land was found to have been omitted from the assessment roll, and a supplemental order was obtained in the *Pueblo Trading Co.* case requiring the supervisors to levy additional assessments, this order providing that any aggrieved landowner could apply to have his lands excluded from this supplemental assessment. The appellees here made such application in that case

and the Court after a hearing in that case ordered the lands excluded from the assessment. No appeal was taken from the order. It may as well be conceded that none of the facts we are stating in this paragraph are of record except inferentially, and we may as well go on therefore to state that the reason no appeal was taken was because plaintiff considered that whatever decision was made would not be binding in any other proceeding anyway.

At the hearing on the plan of composition, counsel for the district offered to introduce into evidence the record in the *Pueblo Trading Co.* case (R. 102) and certain discussion followed, part of which is as follows:

“Mr. Dill. I would like to call attention to one provision in the Baxter Irrigation District—in their plan—in which there are certain parcels of land that are listed and the redemption values given, and at the top of this schedule there is a provision in the plan that if the United States District Court hold that these lands are not within the boundaries of the district they will not be redeemed.

The basis of this provision, of course, was that in the *Pueblo v. Baxter Creek Irrigation District* case, No. 4915—you no doubt remember the hearing that Mr. Cook and myself had, and you made certain orders in that case. At this time, your Honor, I would like to introduce in evidence those orders that were made.

Mr. Cook. To which I wish to object. This point, if your Honor please, resolves itself this way: When these contracts were signed, Exhibit

B containing the land schedules were not attached to the contract—they were subsequently attached—and I don't believe I was aware of the statement on there that the District Court would determine whether this group of land should be excluded or not.

It is true that in the Pueblo Trading Company case your Honor decided that they were not subject to assessment and of course the Pueblo Trading Company is bound by that, but I am appearing in this case today for the Bondholders' Protective Committee. They were not parties to that and I rather question whether the District Court can determine the question of whether so far as the district is concerned these lands are excluded lands.

I suggest, however, that it might be proper for the Court here to make some suggestion or order as to how this matter should be determined. I would suggest that the Superior Court in Lassen County is probably the proper court to determine that question, and that the Trustee in the decree might be directed to either quitclaim to these parties within a period of 90 days or else to bring an action in the Superior Court of that county to determine whether they are in the district or not. But so far as this proceeding is concerned, I object to the introduction of this judgment on the ground that it is not binding upon the Bondholders' Protective Committee." (R. 102, 103.)

At that time Mr. Dill also stated:

"Mr. Dill. Now, in line with Mr. Cook's statement that as to the last plan that when he signed

it the schedule was not attached, I believe he is correct.” (R. 104.)

And Mr. Cook also stated:

“And it just seems to me that that question can be determined, if your Honor feels it has to be determined in this Court, at a subsequent time on the application of these landowners themselves—Mr. Dill is not appearing for them here; * * *” (R. 105.)

“* * * and I am pleading with the Court to deny the introduction of the evidence and to make some order that will permit any landowner to come in here and present his case at a later date regardless of the plan of composition determined to be fair and so forth, * * *” (R. 106.)

The “question” was the one of the status of the so-called “excluded” lands.

At the conclusion of this discussion the judge admitted the record in the *Pueblo Trading Co.* case as Exhibit 30. (R. 108.)

What then followed was of the greatest importance, and is, we will hereafter argue, determinative of this case. A recess was taken (R. 109) and upon re-adjournment Mr. Dill stated:

“Your Honor, there has been some discussion about the offer of proof that I made of certain records of the Pueblo Trading Company and I have been authorized by the Baxter Creek Irrigation District to withdraw those orders because perhaps of some possible question of appeal from

those orders and rather than hinder the approval of this plan, if agreeable with the Court, I wish to withdraw them."

The exhibit was thereupon withdrawn.

SUMMARY OF ARGUMENT.

The so-called excluded lands of the appellee land-owners were made subject to the plan of composition unless the United States District Court should rule in the pending proceeding that they were not within the Baxter Creek Irrigation District and therefore not subject to its indebtedness. (R. 84.) The district attempted to make a showing that they were not so subject by its offer to introduce the record in the *Pueblo Trading Co.* case. But this offer was withdrawn. (R. 109, 110.) There was therefore no record before the Court of the proceedings in the *Pueblo Trading Co.* case, and the matter as to whether these lands were included within the district's boundaries was wholly undetermined so far as the composition proceedings was concerned. This was a matter which had subsequently to be determined and it was therefore proper that the trustee should apply to the Court for such determination, and in denying the trustee a hearing on this matter and in ruling that the cause was *res judicata*, the District Court erred.

I. THERE WAS NO PLEADING NOR RECORD OF THE DECISION IN THE PUEBLO TRADING CO. CASE BEFORE THIS COURT IN THESE PROCEEDINGS.

No pleading of any kind was filed in response to the application for an order and for instructions. Nor was there any pleading in the main bankruptcy case except the statement that *if* the Court rules these lands in Exhibit C properly excluded they shall be so considered. (R. 14, 84.)

There was no record of the judgment or of the proceedings in the *Pueblo Trading Co.* case before the U. S. District Court at any time. This is shown in the statement of the case made above. (15 *Cal. Jur.*, p. 208.)

It is of course elemental that whether pleaded or not, the record of the adjudication must be introduced into evidence.

II. IT WAS THE DUTY OF THE DISTRICT COURT TO GRANT THE ORDER PERMITTING THE TRUSTEE TO PROCEED TO DETERMINATION OF THE ISSUE.

This is really shown by the record which, if it indicates anything at all, indicates that the District Court, and of course that meant District Court sitting in this cause, was to determine whether the landowners' properties were within the district and subject to the debts thereof or not. (R. 14.)

The District Court *did not make this ruling*, and entered its interlocutory decree upon the request of counsel on both sides without such ruling because it

was feared that an appeal from the interlocutory decree would surely be taken and that such appeal would suspend for a long period of time the operation of the plan of composition, and consequently, if this controversial measure should be determined at a later date, the plan of composition itself could proceed smoothly on its main points. This actually is what happened. As a matter of interest, the great majority of the landowners have redeemed their property and the execution of the plan of composition is rapidly approaching its normal termination, except for the determination of a relatively few points, one of which is this question of excluded land. The trustee is acting in good faith and in the interest of the creditors in seeking a determination of the matter. It was upon his own determination (not as trustee but as counsel for one creditor) that his client did not appeal the *Pueblo Trading Co.* case, for while he considered that he had good reason to believe that he could obtain a reversal of the decision in the *Pueblo Trading Co.* case he concluded that such action would not be binding upon all the parties to the then prospective bankruptcy proceeding.

When the hearing upon the plan of composition was held it was the trustee's wise determination that this controversial issue should not be determined at that time so as to avoid appeal. After the entry of the interlocutory decree he waited a reasonable time to see whether the landowners would avail themselves of the provision specifically inserted in the contract and in the interlocutory decree for their benefit which pro-

vided that any landowner might, prior to April 24, 1947, litigate the question as to whether their lands were properly included in the plan of composition. Paragraph VII of the Plan of Composition (R. 81) provides:

“The United States District Court shall have the power to make all necessary corrections as to the aforementioned matters after being advised by competent evidence and statement as to the true facts.”

This refers to mistake as to name or identity as to person and mistake as to the description of any tracts, and the question whether any tracts are subject to assessment to pay this indebtedness.

By Section 26 of the Interlocutory Decree (R. 60) the Court provided:

“That the present or future owners of any of the tracts of land subject to this Plan may take advantage of Paragraph VII of the Plan of Composition in this Court or in any other competent Court at any time prior to April 24, 1947”,

thereby recognizing the Court's obligation to determine all such matters in the future. But the Court failed to decide the present question whether the lands involved were subject to the indebtedness of the district or not by denying the 'Trustee's application for an order permitting him to bring this matter on for decision.

III. THE NECESSARY ELEMENTS FOR A PLEA OF RES JUDICATA ARE ABSENT.

We do not of course concede that the Court was entitled to consider the effect of the Pueblo Trading Company's decision. But if it was proper for the Court to consider it, then the Court erred in determining that as to the *Pueblo Trading Co.* case "such adjudication is binding upon the irrigation district, and any person asserting rights through or as successor in interest to or by virtue of the irrigation district. The above named landowners should not again be required to meet the expense and inconvenience of newly instituted proceedings to determine the same questions decided by Judge Welsh in their favor in the Pueblo Trading Co. case, * * *". (R. 95, 96.)

We believe the thinking here is somewhat mixed. True, there was a decision in the *Pueblo Trading Co.* case, but it was a decision between one creditor, the Pueblo Trading Co., and the Baxter Creek Irrigation District. It is of course binding upon those parties between themselves. The opinion of Judge Welsh also is a matter of some authority which could be cited in any similar or subsequent litigation. But that does not change the rule that there must be identity of parties in order to permit the use of a judgment upon proper plea or in evidence upon the theory of *res judicata* or in estoppel.

35 *C. J.* 756 states:

"To make a former judgment a bar to the maintenance of a present suit, it must have been rendered in an action between the same parties or between those in privity with them. * * *"

Also explaining:

“The privity in respect to the subject matter which is essential to render a judgment operative as a bar to a subsequent action by another plaintiff upon the same cause of action implies relationship by succession or representation between plaintiffs in the two actions in respect to the rights adjudicated in the prior action.”

The Baxter Creek Irrigation District and the purchasers of the bonds are two different and distinct sets of parties to the contract. It has been held that the bond is a contract between the landowners and the bondholders. (*Hershey v. Cole*, 20 Pac. (2d) 972, 130 C. A. 683.) The irrigation district is more identified with the landowners than it is with the bondholders. There may be privity or identity of parties between the landowners and the district, but none between the irrigation district and the creditors. The creditors are on the other end of the contract. Unless the creditors can be bound by the decision in the *Pueblo Trading Co.* case by reason of their identity with the plaintiff, then they cannot be bound at all, and the District Court, in holding in effect as above indicated that the bondholders are all bound because they take as successor to the irrigation is, we submit, error.

Again, however, the argument comes back to the point that *counsel for the district at the hearing in the bankruptcy proceeding before Judge Welsh determined for good and proper reason that the matter of the exclusion of the particular lands in question should be a matter for subsequent determination* and at any rate should not be a matter for determination at that

time. *The fact that Judge Welsh did not in the entry of the interlocutory decree specifically determine this matter is a very cogent reason for now considering that he did not intend to pass upon it and that he intended to reserve that as a matter for subsequent decision upon application thereafter to be made.*

CONCLUSION.

It is respectfully submitted that the lower Court erred in determining that the matter of the excluded lands was *res judicata*. This conclusion it had no right, we submit, to make as the record was not before it, either by pleading or as a part of the evidence. The matter was clearly intended for subsequent consideration and decision by the District Court, and the parties had so agreed in open court. It is respectfully submitted, therefore, that the order of the District Court denying the trustee's application for instructions or for an order to proceed to a determination of the issue should be reversed and the District Court should be directed to proceed now to determine the question as to whether the lands are or are not excluded, or to direct the trustee to bring proceedings in the state court for determination of the issue as the trustee may determine.

Dated, Turlock, California,
July 30, 1947.

W. COBURN COOK,
Attorney for Appellant.

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

W. COBURN COOK, as Trustee,
Appellant,

vs.

BAXTER CREEK IRRIGATION DISTRICT and the
Landowners, H. J. CLARK, LURLEY CLARK,
LENORA M. BAILEY, LYAL ZEITLER, GEORGE
McROREY, RACHEL McROREY, MR. AND
MRS. G. A. BLICKENSTAFF and JAMES M.
FARRELL and AMY L. FARRELL,
Appellees.

BRIEF FOR APPELLEES LENORA M. BAILEY, LYAL ZEITLER,
GEORGE McROREY, RACHEL McROREY, MR. AND
MRS. G. A. BLICKENSTAFF AND JAMES M.
FARRELL AND AMY L. FARRELL.

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Lyal Zeitler, George McRorey, Rachel
McRorey, Mr. and Mrs. G. A. Blicken-
staff, James M. Farrell and Amy L.
Farrell.*

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IN THE
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For the Ninth Circuit

W. COBURN COOK, as Trustee,

Appellant,

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BAXTER CREEK IRRIGATION DISTRICT and the
Landowners, H. J. CLARK, LURLEY CLARK,
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FARRELL and AMY L. FARRELL,

Appellees.

**BRIEF FOR APPELLEES LENORA M. BAILEY, LYAL ZEITLER,
GEORGE McROREY, RACHEL McROREY, MR. AND
MRS. G. A. BLICKENSTAFF AND JAMES M.
FARRELL AND AMY L. FARRELL.**

STATEMENT OF FACTS.

This is an appeal by W. Coburn Cook from an order of the District Court in a composition proceeding under the Municipal Bankruptcy Act. The appeal is from that part of the order denying appellant's

request for instructions authorizing him to institute suit to determine whether certain lands were subject to the debtor's plan of composition. (R. 99.) The individual appellees named herein are the present owners of this land. They and the Baxter Creek Irrigation District appeared before the District Court in opposition to appellant's application. (R. 94.)

The composition proceedings originated in an agreement executed August 28, 1945 by the Baxter Creek Irrigation District with Mr. Cook as the representative of the holders of 79% of the outstanding bonds of the District. (R. 62-83.) This agreement provided that it should be submitted by the District to the United States District Court as a plan of composition in accordance with Sections 81-84 of the Bankruptcy Act. (R. 65.)

The Plan proposed that the owners of land within the District could satisfy the delinquent and unpaid assessments against their land by payment of the amounts set forth in the schedule attached to the Plan. (R. 65.) These amounts were much less than the existing assessments against the land and the District proposed that this payment would relieve the landowner of any further liability for assessment to satisfy the outstanding indebtedness. The amounts so paid were referred to as redemption values. All money received under the provisions of the Plan was to be deposited with the First National Bank in Turlock for distribution directly to the non-consenting creditors and to Mr. Cook as agent for the consenting creditors. (R. 74-77.)

Those lands which were not discharged from liability for the outstanding bonds by payment of the redemption price, the District agreed, would be sold to the District for the delinquent levies immediately upon expiration of the redemption period. The Plan further provided that all property received by the District, whether under the Plan or otherwise acquired, would be conveyed to Mr. Cook as trustee for both the consenting and non-consenting creditors. (R. 72-74.)

The Plan was accepted by 80% of the creditors prior to filing (R. 5) and on September 17, 1945, the Plan with consents attached, and the District's Petition for Confirmation of Composition were filed with the District Court. (R. 2.) The Court's order approving the filing of the petition was filed the same day. (R. 30.) The hearing on the petition was held December 7, 1945. On January 3, 1946, the court entered its findings of fact, conclusions of law, and interlocutory decree approving the Plan. (R. 28-61.)

Schedule B attached to the Plan and incorporated therein by reference consisted of 11 pages and set forth a description of lands with the redemption values for each tract. The last part of Schedule B appearing on pages 10 and 11 is entitled "Supplement to Baxter Creek Irrigation District (Cont'd)" and provides:

"If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'."

Listed below this provision are the names of the owners and the descriptions of lands and redemption values for the properties which are the subject of Mr. Cook's application for instructions. (R. 84-88.)

In *Pueblo Trading Co. v. Baxter Creek Irrigation District*, No. 4195 L (reported in 61 Fed. Supp. 586), Mr. Cook, as attorney for the plaintiff, sought to compel the levy of an assessment by the District against the very lands involved here. The District was the named party defendant in that action but the landowners, pursuant to order of the District Court, intervened in the proceeding and opposed Mr. Cook's application. The District Court in that action ruled that the lands were not within the boundaries of the District and not subject to assessment by the District (6 Fed. Supp. 586). (R. 94.) By the application for instructions filed below, Mr. Cook sought authority from the Bankruptcy Court to relitigate this issue which was decided adversely to him in the *Pueblo* case. Mr. Cook's appeal is from that part of the Court's order filed March 17, 1947, denying his application for this authority. His application also sought authority to determine the liability of lands of the United States to assessment under the Plan. This authority was granted by the lower Court upon the condition that appellant institute such actions or proceedings within 30 days from notice of the Court's order. (R. 97.) Appellant's notice of appeal was filed April 21, 1947. (R. 99.) Appellant took no action as to the Government lands within the time prescribed

by the Court's order and all questions concerning it became moot prior to the expiration of the time for the filing of a cross-appeal.

I.

APPELLANT HAS NO AUTHORITY TO RAISE THE QUESTION PRESENTED BY THE APPLICATION FOR INSTRUCTIONS.

The application for instructions was filed in the Bankruptcy Court and the appeal taken herein by Mr. Cook as "Trustee for the Creditors of the Baxter Creek Irrigation District." The role of trustee has been assumed by Mr. Cook from the outset of his efforts to promote the plan of composition. The original contract with the District was entered into by Mr. Cook as agent for the Bondholders Protective Committee and certain other creditors who had deposited their bonds with him for purposes of collection. (R. 62.) At that time he was trustee for no one. The opening paragraph of the agreement, however, provides that it is between "W. Coburn Cook, hereinafter referred to as the Trustee, and the Baxter Creek Irrigation District, hereinafter referred to as the District." The agreement is signed by appellant, "W. Coburn Cook, Trustee." (R. 83.)

The significance of the use of this connotative term for purpose of identification soon appears. Paragraph I of the agreement provides that "said Trustee, as trustee for all bondholders, coupon holders, warrant holders and such judgment holders" will accept

payment from the landowners within the District in satisfaction of the liability of the land for payment of the indebtedness. (R. 65.) Paragraph II provides that all money in the District's Bond Fund and all property received by the District under the Plan or otherwise acquired shall be conveyed to Mr. Cook as Trustee for all of the creditors. (R. 69-74.)

The dual capacity of Mr. Cook, as trustee for all and as agent for some, appears in Paragraph III. It is there provided that the trustee shall deposit all money received by him under the Plan in the First National Bank of Turlock. The Bank is then directed to satisfy its expenses as depositary and Mr. Cook's claim for compensation as Trustee and "then divide the balance remaining between the Non-depositing Creditors and the said Trustee in accordance with their proportionate interest therein as hereinafter more definitely provided." (R. 74-77.)

This dual capacity is further illustrated by Paragraph XVI of the Court's findings of fact which provides:

"XVI.

That W. Coburn Cook is an agent hired by the creditors he represents; that he has filed herein and offered in evidence his written contract of employment with said creditors and said contract, together with Paragraph III of said Plans, reveals the compensation that he is to receive for his work in effecting the plan of *compensation* (sic) with said District and acting as trustee under the plan filed herein in carrying out the provisions of the Plan and such compensation is

reasonable and fair and is the only compensation that he will receive for his efforts in this matter.” (R. 35.)

The Petition for Confirmation of the Plan contains no prayer for the appointment of a trustee and the Court made no finding that the appointment of a trustee was necessary. Paragraph 27 of the Interlocutory Decree approving the Plan, however, provides:

“27. W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein and authorized to carry out the terms of the plan of composition, and he may apply to this Court for orders of assistance to that end or for instructions, upon notice to the petitioner. The compensation of said Trustee is fixed at fifteen per cent (15%) of the first Thirty Eight Thousand Eight Hundred and No/100 Dollars (\$38,800.00) received by the Trustee or depository on behalf of the creditors of the Baxter Creek Irrigation District, and fifty per cent (50%) of all amounts received in excess thereof whether in cash, property or otherwise, and he may at his option take his fee either in cash or property received.” (R. 60.)

Paragraph 28 of the Decree further provides:

“28. The District is authorized to make the transfers and conveyances to W. Coburn Cook, Trustee, as provided by the plan and the trustee is authorized and directed to accept such conveyances and to administer the properties and to rent, hypothecate, sell or otherwise operate the same as trustee as in his direction may seem advisable

and for such purpose may designate an agent or agents." (R. 61.)

Paragraph 20 of the Interlocutory Decree also makes provision for an application for instructions. It provides:

"20. * * * That the debtor Baxter Creek Irrigation District or the Trustee may from time to time apply to this Court for such other order or orders as may be necessary to carry out and make effective this Interlocutory Decree and this Court hereby reserves and shall have full and complete jurisdiction of said Plan of Composition." (R. 58.)

Appellant bases his right to institute suit against appellees on the provisions of Paragraphs 20 and 27 of the Interlocutory Decree. Appellant claims that his appointment as trustee under Paragraph 27 of the decree vested him with the right and duty of a regular trustee in bankruptcy to bring actions to preserve and protect the debtor's property.

This claim overlooks the fundamental distinction between ordinary bankruptcy proceedings and composition proceedings under Sections 81-84 of the Municipal Bankruptcy Act. This distinction was clearly expressed in an earlier case before this Court in which Mr. Cook appeared as counsel for the unsuccessful appellant, *Newhouse et al. v. Corcoran Irrigation District*, 114 Fed. (2d) 690. Judge Stephens there stated:

"Throughout appellants' briefs the principle of ordinary or private bankruptcy that the assets of the bankrupt, including his property, must be

effectively applied to the debts, is sought to be applied to the situation before us. The bankruptcy of a public entity, however, is very different from that of a private person or concern. The operative assets of an irrigation district and the value of the land of the District, of course, have their evidentiary value as to the amount of money the District can reasonably raise to meet its indebtedness. These elements of value are too affected by the incumbrances upon the land, which in this case appear to be very considerable. But such assets and such property within the District cannot be disposed of as in the ordinary bankruptcy proceeding for the benefit of the debtor. See *Clough v. Compton-Delevan Irrigation District*, 12 Cal. (2d) 385, 85 P. (2d) 126, 128."

This distinction was reiterated by this Court in the case of *Lorber v. Vista Irrigation District*, 127 Fed. (2d) 628, 637, where Mr. Cook again appeared on behalf of the appellants. In rejecting appellants' claim that the District Court should have made a finding as to the assets of the District and their relation to its liabilities before the conclusion could be properly drawn that the District was unable to meet its debts as they mature, this Court said that the situation was similar to the one under consideration in *Newhouse v. Corcoran Irrigation District*, *supra*, and quoted the foregoing part of the Court's opinion in the *Newhouse* case.

In an ordinary bankruptcy proceeding the object is to apply the debtor's assets as completely as possible to satisfy his debts. To further the accomplishment

of this objective, the law with respect to these proceedings expressly provides for the appointment of a trustee by the Court who succeeds to the title to all the debtor's property for the benefit of the creditors. As the successor to the title of all the debtor's property, he is empowered by law to bring all the necessary actions to preserve and protect the property for the benefit of the creditors.

A municipal composition proceeding, however, while maintainable under the bankruptcy powers, is a proceeding for voluntary settlement of its indebtedness and not a proceeding to adjudge the district a bankrupt, and although the jurisdiction of the Court over the municipal agency and its debt funds for the purpose of effectuating the composition is exclusive, that jurisdiction does not and cannot extend to adjudging the municipal agency bankrupt or to administering its affairs as in bankruptcy. See *Leco Properties v. R. E. Crummer & Co.*, 128 Fed. (2d) 110, 112, 113.

Despite the Court's clear and explicit rulings adverse to him in the *Newhouse* and *Lorber* cases, appellant's application for authority to institute suit against the appellees in this case demonstrates that he has not yet been able to divorce himself from the view that the foregoing principles of law in an ordinary bankruptcy proceeding apply to composition proceedings under the Municipal Bankruptcy Act.

As a result of the Supreme Court's decision in *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513, 80 L.Ed. 1309, 52 Sup. Ct. 892,

Congress expressly drafted Sections 81-84 of the present act so that they did not impinge upon the sovereignty of the State or its political subdivisions. Only voluntary petitions are permitted under the law. Furthermore, the District Court's jurisdiction is limited to confirming or disapproving plans proposed by the debtor. The Court has no power to modify or alter the plan without the debtor's consent and has no jurisdiction to consummate them. The plans remain nugatory until the district elects to perform its part under the confirmed plan. *Leco Properties v. R. E. Crummer & Co.*, 128 Fed. (2d) 110. Subsection (i) of Section 73 of the earlier Act which conferred jurisdiction upon the Court upon the filing of the petition for composition to proceed and fixed the rights and duties of the district and creditors "the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered" was omitted from the 1937 Act. Under the new sections, even the power of reference is expressly limited to having findings made on special issues.

Provision is made in the Act for the appearance of individual creditors, committees, and agents and attorneys for such creditors and committees. Section 83 (a) provides:

"For all purposes of this chapter any creditor may act in person or by an attorney or a duly authorized agent or committee. Where any committee, organization, group, or individual shall assume to act for or on behalf of creditors, such committee, organization, group, or individual shall first file with the court in which the proceeding is

pending a list of the creditors represented by such committee, organization, group, or individual, giving the name and address of each such creditor, together with a statement of the amount, class and character of the security held by him, and attach thereto copies of the instrument or instruments in writing signed by the owners of the bonds showing their authority, and shall file with the list a copy of the contract or agreement entered into between such committee, organization, group, or individual and the creditors represented by it or them, which contract shall disclose all compensation to be received, directly or indirectly, by such committee, organization, group, or individual, which agreed compensation shall be subject to modification and approval by the court."

Section 83 (b) provides:

"The court may allow reasonable compensation for the services performed by such referee in bankruptcy or special master, and the actual and necessary expenses incurred in connection with the proceeding, including compensation for services rendered and expenses incurred in obtaining the deposit of securities and the preparation of the plan, whether such work may have been done by the petitioner or by committees or other representatives of creditors, and may allow reasonable compensation for the attorneys or agents of any of the foregoing."

In addition to this, the Court is authorized under Section 83 (f) to direct the deposit of "money, securities or other consideration to be delivered to the

creditors under the terms of the plan” to “such disbursing agent as the court may appoint.”

Nowhere in these precisely set out provisions for the exercise of the composition jurisdiction is provision made for the appointment or compensation of a trustee to succeed to the district's properties or any of its rights and duties. Such a provision would be repugnant to the fundamental premise of the composition sections that the district's independence is to be observed at all times.

The Court's authority to appoint depositaries and to recognize agents and attorneys of individuals or groups of creditors is set out above. Acceptance or confirmation of the position of such an agent by the Court, whether denominated agent or trustee, however, cannot invest the agent with control or authority over the debtor's affairs or its property. As agent for the creditors under the Plan charged with the duty of distributing funds delivered to him by redeeming landowners and funds and property delivered to him by the District under the Plan, it is understandable that provision was made for the agent to apply for instructions from the Court. Similarly, provision was made for the District to apply for instructions concerning its rights and duties under the Plan. (R. 58.) The agent's right to instructions, however, as his authority, could extend only to matters concerning distribution of the funds and property which had been delivered to him under the Plan and not to questions of property rights of the debtor. Such a construction of Paragraphs 20 and 27 is the only one compatible

with the validity of the plan of composition. The rights which appellant claims under this paragraph cannot be recognized without applying the principles of ordinary bankruptcy proceedings to composition proceedings advanced by him in *Newhouse v. Corcoran Irr. Dist.*, supra, and *Lorber v. Vista Irr. Dist.*, supra, but so clearly rejected by this Court.

That Paragraphs 20 and 27 of the Interlocutory Decree were not intended to be construed as vesting appellant with authority in connection with the District's property is shown by Paragraph 16 of the Interlocutory Decree which provides:

“16. *That each and all of the creditors of the Petitioner holding any security or securities affected by said Plan of Composition is adopted, including all of said bonds, all of said coupons, all of said warrants whether registered or not and all of said judgments, and the agents, servants, attorneys and employees of said creditors, or any of them, and their successors and assigns are hereby restrained and enjoined, from in anywise enforcing or attempting to enforce any of said bonds, coupons, warrants, and judgments or any rights in connection therewith in any manner inconsistent with or contrary to the terms or provisions of said Plan of Composition or other than as in said Plan of Composition provided, and they and each of them be and hereby are enjoined, pending the entry of the final decree herein, from attempting the enforcement of any claim or lien by legal proceedings or otherwise which they may have against Petitioner or against any and all of the land situated within the boundaries of the*

District (Petitioner) and/or all land, if any, which was ever within said District.” (R. 56.) (Italics ours.)

The purpose and validity of such a provision of the decree is discussed and sustained by this Court in *Nolander v. Butte Valley Irr. District*, 132 Fed. (2d) 704, 705. The provisions of this paragraph as effectively enjoin appellant, the bondholders' agent, from instituting a suit against appellees' land as it does the individual creditors, consenting or non-consenting. To permit appellant to prevail in the present application would be to condone a clear evasion of this express prohibition.

II.

APPELLANT'S APPLICATION FOR INSTRUCTIONS WAS ADDRESSED TO THE DISCRETION OF THE COURT AND THE ORDER THEREON IS NOT APPEALABLE BY HIM.

If it be assumed that appellant's authority extended to questions concerning the debtor's property and that he had the right to petition for instructions from the Court on such matters, the Court's order entered on such application is not appealable by him. Petitions for instructions in bankruptcy proceedings are addressed to the discretion of the Court. Its decisions on such matters are in main administrative rather than judicial decisions. See *Burco, Inc. v. Whitworth*, 81 Fed. (2d) 721, 728.

If appellant possessed the authority which he now claims, he had the right to exercise his independent

judgment as to the course to be pursued. Having elected, however, to submit the matter to the Court for its advice, he is now in no position to take an appeal from the advice so solicited. No reported case has been found where the trustee has been permitted to take an appeal from the Court's order upon his application for instructions. Decision of this question was expressly reserved by this Court in the case of *In re Western Pacific R. Co.*, 122 Fed. (2d) 807.

In cases where the Court has instructed the trustee upon his application to take some action, parties who would be adversely affected by the trustee's action have been permitted to appeal from the order. *In re J. Rosen & Sons*, 130 Fed. (2d) 81, 84; and see *Board of Road Commissioners of Monroe County, Michigan v. Keil*, 259 Fed. 76, where the appeal was dismissed because not from a final order but a petition to revise under the existing rules was granted. These cases are not authority for extending the right of appeal to the trustee who has invited the ruling of the Court by the presentation of his application for instructions. It is respectfully submitted that if the trustee declines to rely upon his own judgment and submits the proposal to the Court for its instructions, no reason exists why the trustee should not be bound by this election. If the trustee's desired course of conduct is so little supported in his own judgment that he cannot proceed without the approbation of the Court, the Court's disapproval hardly provides the basis for permitting him to appeal from the order as a matter of right.

III.

**THE DENIAL OF THE APPELLANT'S REQUEST WAS PROPER
AND WITHIN THE DISCRETION OF THE COURT.**

A. The status of these lands had been determined by the Pueblo case.

Mr. Cook had been before the District Court a short time before on the same question that was raised by his application for instructions. Pueblo Trading Co. was the plaintiff in the previous action and the District was the named party defendant. In the course of the action the plaintiff, represented by Mr. Cook, sought an order directing the assessment of the lands owned by H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Lyman Dermott Stiles, James M. Farrell and Amy L. Farrell. These parties intervened pursuant to order of Court and opposed the assessment of the land on the ground that it was outside the District. (R. 94-96.) The Court decided the matter in favor of the landowners, filing a written opinion which is reported in 61 Fed. Supp. 586. The Court's holding in that case was as follows:

“It is therefore held that the lands of the aforesaid petitioners herein, and each of them are not located within the boundaries of the Baxter Creek Irrigation District, defendant in the above entitled action, are not subject to the indebtedness of said defendant, and are not liable or subject to assessment by said defendant, the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector, Treasurer, or any other officer of said County, or any of them, to pay the judgment rendered in the above en-

titled action; * * *” (61 Fed. Supp. 586, at page 590.)

That part of Schedule B attached to the Plan of Composition which related to these lands expressly provided:

“If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit ‘B’”. (R. 84.)

This provision also appears in Exhibit C attached to the Petition for Confirmation of the Plan. (R. 14.)

That the decision in the *Pueblo* case satisfied this provision was recognized by the District Court in the bankruptcy proceedings. Paragraph XIX of the findings of fact (R. 37-38), Paragraph XV of the conclusions of law (R. 46-47) and Paragraph 14 of the interlocutory decree (R. 55-56) relating to the levy of an additional assessment to pay the expenses of the plan of composition provide that the assessment is to be “levied against the amount listed in the column labeled ‘Amount’ in (Exhibit) Schedule ‘B’ of the Plan of Composition *for each of the tracts (plats) of land subject to assessment for the indebtedness of the District which are listed on pages 1 to 9 inclusive in (Exhibit) Schedule ‘B’ to the Plan now on file herein.*”

This provision is the sole reference in the Findings, Conclusions of Law and Interlocutory Decree relating to the land subject to assessment for the indebtedness of the District. The lands of appellees are excluded

under these provisions from the lands subject to assessment for the indebtedness of the District as they are not included in the lands listed on pages 1 to 9 of Schedule "B" but appear at the conclusion of this list on pages 10 and 11.

The Court's finding in this regard is supported by Exhibit 29 introduced into evidence at the hearing preliminary to the entry of the Interlocutory Decree. This exhibit sets forth that "Tracts 1, 2, 17, 21 23 & 6 (the lands of appellees herein) were held not to be in said District by the United States District Court, Northern District of California, Northern Division in *Pueblo Trading Co. v. Baxter Creek Irrigation District*, No. 4195 L, so should be disregarded and not taken into consideration pursuant to the Plan. (See 61 Fed. Supp. 586.) Tract 13, was also held not to be within said District pursuant to Stipulation and Order dated October 9, 1945, in *Pueblo Trading Co. Case 4195 L.*" (R. 99.)

The Court's finding in this regard is further supported by Exhibit 15 introduced into evidence at the same hearing. This exhibit is a map of the lands within the District and excludes the lands of these appellees from the boundaries of the District. (This is one of the original exhibits transmitted to the Circuit Court of Appeals.)

Appellant bases a considerable part of his argument on the fact that he objected to the introduction of the judgment in the *Pueblo Trading Co.* case into evidence and that this exhibit was subsequently withdrawn from evidence. This is relied upon by appellant to

support his contention that the parties never intended the judgment in the *Pueblo* case to be determinative of the liability of appellees' lands to the Plan of Composition but that it was to be determined by subsequent proceedings in the Bankruptcy Court.

Appellant's claim in this regard is unsupportable. The provision in the Plan of Composition is that appellees' lands are not to be considered as part of Exhibit "B" if "U. S. District Court" rules they are not within the Baxter Creek Irrigation District. (R. 84.) The *Pueblo* case was pending in the U. S. District Court at the time of the preparation and filing of the Plan of Composition. The Schedule by its terms refers to a decision by the U. S. District Court and is not limited to a decision in the bankruptcy proceedings. The decision in the *Pueblo* case as to these lands was one made by the U. S. District Court and evidence of this decision was introduced in the bankruptcy proceedings. The introduction of the judgment in the *Pueblo* case was rendered unnecessary by the introduction of the foregoing Exhibits 29 and 15 which set forth sufficient information to support the Court's finding in this regard.

The withdrawal from evidence of the formal orders in the *Pueblo* case was made as appears from the record of the proceedings at that time "because of some possible question of appeal from those orders." (R. 109.) Irrespective of any question of appeal at that time, no steps to perfect an appeal were taken in the time intervening between the hearing on the plan and the entry of the findings, conclusions of law and

interlocutory decree. It is submitted that there was sufficient evidence in the record at that time to support the Court's findings and conclusions relating to the land subject to assessment and the provisions of the interlocutory decree hereinabove referred to. No attack has ever been made on these provisions and they are now binding as to all parties. *Glenn-Colusa Irr. Dist. v. Mason*, 143 Fed. (2d) 564.

B. A finding of res judicata is not necessary to sustain the lower Court's order.

Appellant claims that the *Pueblo* case is not *res judicata* of the liability of appellees' lands to the Plan of Composition and that therefore the lower Court's ruling on his application for instructions is erroneous as a matter of law. The application for instructions was one addressed to the Court's discretion and will be reversed only for an abuse of discretion. The lower Court pointed out that the very question under consideration had been fully and completely heard just a short time earlier before the same judge that was sitting in the composition proceedings. A written opinion on the merits had been filed and reported. This opinion was read and studied by the lower Court as appears from its opinion. (R. 94.)

A finding of *res judicata* is not necessary to uphold the lower Court's ruling that appellant should not institute suit to relitigate the liability of appellees' lands to the plan of composition. See *Board of Road Comm'rs etc. v. Keil*, supra, and *In re J. Rosen & Sons*, supra. If it be assumed, therefore, that techni-

cally Judge Welsh's decision was not *res judicata* of the matter, the circumstances of the situation considered by the Court were more than sufficient to establish that the ruling was proper and not an abuse of discretion.

C. The Pueblo case is *res judicata* as to the status of appellees' land.

It is submitted, however, that not only is the lower Court's ruling on the application for instructions supportable as a proper exercise of his discretion under the circumstances but that the decision on the matter in the *Pueblo* case would be *res judicata* in another proceeding whether it be brought by Mr. Cook, as agent or trustee for the creditors, or by the District. Mr. Cook's claim that the *Pueblo* case is not *res judicata* as to the matter is predicated on the fact that all the creditors were not a party plaintiff to the *Pueblo* proceeding.

As required by Sections 83 (a) and (b) of the Act, the Bondholders Protective Committee filed in the composition proceedings its statement of expenses incident to the plan of composition and its representation of the creditors and sought approval of these expenditures by the Court. Paragraph 5 of the Statement of Expenses provides:

"5. Legal services due and payable to W. Coburn Cook, Berg Building, Turlock, California, in special proceedings on behalf of and for the benefit of the bondholders protective committee, including services in a representative capacity in the case of Pueblo Trading Co. v. Tule Irrigation

District and Pueblo Trading Co. v. Baxter Creek Irrigation District, Proceedings in relation to the assessment of lands in the Tule Irrigation District and Baxter Creek Irrigation District and pertaining to the expulsion of land and reference thereto.....\$3,500.00". (R. 21.)

Paragraph XVII of the Court's findings of fact approves these expenses and provides:

"That the statement of expenses filed by the Bondholders Protective Committee is fair and reasonable; that the services of W. Coburn Cook in the Pueblo Trading Co. v. Baxter Creek Irrigation District, No. 4195 L, were performed in a representative capacity for *all* creditors of said District." (Italics ours.) (R. 36.)

Mr. Cook was very happy to have this finding entered in connection with the approval of the payment of his legal fees that his services in the *Pueblo* case were performed in a representative capacity for all creditors of the District. Now that this finding as to his fees has become final and unappealable Mr. Cook baldly disclaims any action in a representative capacity for all creditors of the District. Neither Mr. Cook nor any of the creditors saw fit to challenge this finding of the Court and should not be heard to complain now that such action was not representative of all of the creditors.

It is not essential to a holding of *res judicata*, however, that a finding be made that Mr. Cook's action in the *Pueblo* case was in a representative capacity for all the creditors. As Judge Foley pointed out in

his opinion, the District was a party to the *Pueblo* case and the adjudication in that action is binding on the District "and any person asserting rights through, or as successors in interest to, or by virtue of the irrigation district." (R. 95.) In this case, whether Mr. Cook be regarded as vested with all the rights of a regular trustee in bankruptcy or merely as an agent for all the creditors, his rights are derivative. It is well settled that a judgment against the debtor is binding on the trustee in bankruptcy as his rights are derived from the bankrupt. *Detroit Trust Co. v. Schantz*, 14 Fed. (2d) 225, aff'd 16 Fed. (2d) 943. Similarly, as agent for all the creditors, Mr. Cook's right to litigate the status of appellees' lands is foreclosed by the ruling in their favor in the *Pueblo* case to which the District was a party. The officers of the District represent all the creditors of the District, including the bondholders, in such proceedings. *Kersh Lakes Drainage Dist. v. Johnson*, 309 U.S. 485, 60 Sup. Ct. 640, 84 L. Ed. 881; *Bloomfield Village Drain. Dist. v. Keefe*, 119 Fed. (2d) 157, 165, 166. In the *Kersh* case, as here, the question in the first proceeding was the taxpayer's liability for an assessment which had been levied against his land. The Court ruled in the landowner's favor and in a later suit brought by a creditor to enforce collection of the assessment, the Supreme Court held that the District in the first proceeding represented all the creditors and bondholders and that they were foreclosed by the first decree in the landowner's favor. These decisions are controlling here.

Appellant claims that the Court's decision below was in error because there was no formal plea of *res judicata* and the judgment in the *Pueblo Trading Co.* case was not introduced in evidence. It is said that without these steps, there could be no finding of *res judicata* in this action. Appellant misconceives appellees' position. Appellees have never contended that the *Pueblo* case decision foreclosed the Court's consideration of appellant's application for instruction but that the *Pueblo* decision would be *res judicata* in another proceeding seeking to establish that the land was subject to assessment by the District and that for this reason the application for instructions should be denied. Mr. Cook's argument that the lower Court had no right to consider Judge Welsh's decision in the *Pueblo* case on the identical issue presented by his application for instructions because it was not formally pleaded and proved, bespeaks poorly of his good faith in filing the application. Having solicited the advice and counsel of the Court on the matter, the obligation was on Mr. Cook, if anyone, to see that the Court was fully advised as to all the pertinent facts. In good conscience and the performance of his duty as a self-professed officer of the Court, the facts concerning the past litigation of this same issue should have been fully pleaded by Mr. Cook in his application for instructions. He should not now be heard to argue that the wisdom of the Court's judgment on his application should be weighed on the basis of the success or failure of his concealment of the facts.

IV.

APPELLANT HAS BEEN GUILTY OF LACHES.

If appellant was possessed of the authority which he claims, his application to the Court on October 27, 1946, was barred by laches. The last of the orders in the *Pueblo* case was entered October 9, 1945. (R. 108.) Notice of entry of the orders was filed October 25, 1945. (R. 108.)

The Interlocutory Decree was filed January 3, 1946. (R. 50.) The times for appeal from all of these orders have long past run. The landowners whose lands were subject of appellant's claim relied on the finality of these orders. The property of Lyman Demott Stiles was sold to Mr. and Mrs. Blickenstaff, appellees herein (R. 94), and the property of the Farrells was sold to Harry and Minnie Reuck (see affidavit of counsel filed herein on August 21, 1947). No justification for the appellant's delay in this matter has been offered. It would be patently unfair and unjust to make these owners now defend another action to test their titles. These intervening rights which have become vested upon the faith of the prior decrees should be given consideration by the Court. See *Bekins v. Compton-Delevan Irr. Dist.*, 150 Fed. (2d) 526, 530.

V.

THE LANDOWNERS WHO APPEAR AS APPELLEES HEREIN
HAVE A REAL AND SUBSTANTIAL INTEREST IN THE MAT-
TER AND ARE PROPER PARTIES TO THE APPEAL.

No question has been raised by appellant in his opening brief concerning the landowners' right to appear in this proceeding. At the time of the hearing before the lower Court, however, appellant strenuously objected that the landowners were not proper parties before the Court and that they should not be heard in opposition to his application. Appellant's objection was disregarded by the District Court and appellees were heard in opposition to the application just as they were permitted to intervene and oppose Mr. Cook's previous application in the *Pueblo* case seeking to subject the lands to assessment for the District's indebtedness.

The plan of composition is "in its essence a contract, proposed by the debtor and agreed to by those of the creditors who give consent, and they in the requisite majority bind all. *American United Life Ins. Co. v. Haines City, Fla.*, 117 Fed. (2d) 574. The landowners who are appellees herein were certainly third party beneficiaries of the provision of the plan that the status of this land should be determined in the "U. S. District Court" and that if it "rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'." (R. 84.)

Apart from this fact, however, the right of persons who would be adversely affected by the granting of the instructions to appear and be heard on the matter

has been recognized in many cases. *In re J. Rosen & Sons*, 130 Fed. (2d) 81, 84; *Burco v. Whitworth*, 81 Fed. (2d) 721, 728-729; *Penn. Cement Co. v. Bradley Const. Co.*, 274 Fed. 1003; *Bd. of Road Commissioners of Monroe County, Mch. v. Keil*, 259 Fed. 76. The *Rosen*, *Burco* and *Keil* cases were appellate decisions and in each case the appeal was taken by the party adversely affected by the order entered on the trustee's application for instructions. If the party adversely affected has the right to take an appeal, it is clear that the corresponding right to appear in opposition to the appeal should be extended to him.

CONCLUSION.

Appellant's summary disposition of this matter in his opening brief does not reflect its importance to the landowners herein. As an experienced promotor and perennial litigant in California irrigation and reclamation district cases, the institution of another suit or the taking of another appeal means little to appellant except the possibility of a greater fee. To these landowners, however, their land is not only their present livelihood but represents the culmination of a lifetime of hard work. The prospect of loss of this land is a vital matter to them. They have had to face that prospect once already in the *Pueblo* case.

Appellant's claim was completely and finally disposed of by Judge Welsh's decision in the *Pueblo* case. The right of appeal was open to appellant if he conscientiously felt the Court had erred. This right, however, he did not see fit to exercise. Now

appellant seeks authority to institute a second vexatious suit to relitigate the same matter. He has not advanced any basis such as newly discovered evidence or changes in the applicable law to support the present application. In fact, it is his contention that the Court should close its eyes to the fact of the prior litigation. The only basis for the present application is appellant's desire to have another try at it in another forum.

Appellees earnestly believe that the instructions sought by appellant transgress his authority and are predicated on the false premise that he has the rights and duties of a trustee in an ordinary bankruptcy proceeding. Further, it is believed that appellant has no right to appeal from the instructions which were given by Judge Foley in response to his application. On the merits, however, it is submitted that the instructions were not only proper and within the Court's discretion but that they were the only instructions that could have been given under the circumstances. The order appealed from should therefore be affirmed.

Dated, San Francisco,
September 24, 1947.

Respectfully submitted,

FRANKLIN A. DILL,

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Lyal Zeitler, George McRorey, Rachel
McRorey, Mr. and Mrs. G. A. Blicken-
staff, James M. Farrell and Amy L.
Farrell.*

No. 11,632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. COBURN COOK, as Trustee,

Appellant,

VS.

BAXTER CREEK IRRIGATION DISTRICT and
the Landowners, H. T. CLARK, LUR-
LEY CLARK, LEONORA M. BAILEY,
LYAL ZEITLER, GEORGE MCROREY,
RACHEL MCROREY, MR. AND MRS.
E. A. BLICKENSTAFF and JAMES N.
FARRELL and AMY L. FARRELL,

Appellees.

APPELLANT'S CLOSING BRIEF.

W. COBURN COOK,

Berg Building, Turlock, California,

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FILED

OCT 6 1947

PAUL P. O'BRIEN, 

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FARRELL and AMY L. FARRELL,
Appellees.

APPELLANT'S CLOSING BRIEF.

Appellant in this closing brief will confine the argument to a brief reply to appellees' argument, and will follow their headings.

STATEMENT OF FACTS.

Considerable emphasis has been placed by the appellees in the statement of facts and elsewhere

throughout their brief upon the wording which appears as part of Schedule B which is entitled "Supplement to Baxter Creek Irrigation District" and which says: "If the U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B' ". (R. 14, 84.)

Appellant stated to the District Court (R. 102, 103) that "When these contracts were signed, Exhibit B containing the land schedules were not attached to the contract—they were subsequently attached—and I don't believe I was aware of the statement on there that the District Court would determine whether this group of land should be excluded or not".

To this Mr. Dill, counsel for the bankrupt, replied (R. 104): "Now, in line with Mr. Cook's statement that as to the last plan that when he signed it the schedule was not attached, I believe he is correct."

It does not appear that this part of the record should have the emphasis directed to it by appellees.

However, it does serve to point to the fact that counsel withdrew the entire record in *Pueblo Trading* case from consideration by the Court, for the reason that a decision by the Court at that time would lead to an appeal and hold up the operation of the plan of composition and that no decision was made by the District Court judge in the findings or decree relative to the so-called excluded lands.

The appellant pointed out to the Court in making his objection to the introduction of this record the

desirability of making no decision on that question at that time, stating (R. 103): "It is true that in the Pueblo Trading Company case your Honor decided that they were not subject to assessment and of course the Pueblo Trading Company is bound by that, * * *".

"I suggest, however, that it might be proper for the Court here to make some suggestion or order as to how this matter should be determined. I would suggest that the Superior Court in Lassen County is probably the proper Court to determine that question, and that the Trustee in the decree might be directed to either quitclaim to these parties within a period of 90 days or else to bring an action in the Superior Court of that county to determine whether they are in the district or not."

Some further explanation should perhaps be here made to the Court as to the position of W. Coburn Cook both as an individual and as the trustee in these proceedings. He has been referred to in appellees' brief in the conclusion as a "perennial litigant" and as a "promoter". Both statements are entirely incorrect as describing his life work up to this time. He is of course a "perennial counselor in litigation", but the only promotion that he has ever done has been in the promotion of the contract of composition in this case.

It is plain to see what his position has been in this matter. In the first instance he was counsel for Pueblo Trading Company in bringing an action against the two irrigation districts on relatively small

blocks of bonds. In those proceedings he obtained for his client an order from the Federal Court requiring the Supervisors of Lassen County to levy assessments for the entire debt. This levied assessment led to the negotiations for a settlement. After the commencement of this litigation and before the settlement of the affairs of the district was negotiated, Mr. Cook was engaged by the Bondholders Protective Committee representing some 79% of the creditors to undertake a settlement of the entire debt matter. The Pueblo Trading Company required that the Bondholders Protective Committee should assume and pay the attorney fees incurred in the *Pueblo Trading Company* case. This fee was charged not against the creditors as a whole but against the Bondholders Protective Committee only. The compensation of Mr. Cook as representative and negotiator for the Bondholders Protective Committee was strictly a matter between him and that committee, except that the Federal statutes required disclosure of fees and relationship.

For that purpose Mr. Dill wanted the finding relative to this matter of fees. (R. 36.) It has never been determined how far the Federal Court can go in disapproval of contracts made out of Court between attorneys and creditors, except in so far as use of composition funds may be concerned. Mr. Dill, not Mr. Cook as an attorney was anxious for this finding.

Eventually a contract was negotiated between Mr. Cook as the agent of the Bondholders Protective Com-

mittee and the two districts in question. (R. 62.) This contract contemplated that it should become the basis of a composition proceeding to be approved by the Court (R. 82) and that all bondholders and creditors should become bound to the agreement. In this agreement, and with the apparent advice and consent of counsel for appellees, Franklin A. Dill, and as attorney for the district, Mr. Cook was named as trustee for all creditors, and as such he was designated by the Court itself in its findings and decree. (R. 60.) It would appear that Mr. Cook is not an individual litigant in this cause but an appointee of the Court with consequent duties to perform.

I. APPELLANT HAD AUTHORITY TO RAISE THE QUESTION PRESENTED BY THE APPLICATION FOR INSTRUCTIONS.

Appellant does not believe it necessary to take a position in this matter as to whether he is a trustee in the exact sense contemplated by ordinary bankruptcy procedure. But it is clear that he was appointed trustee for the creditors of the Baxter Creek Irrigation District by the Court. As pointed out by appellees, paragraph 27 of the decree provides: "W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein. * * * "He is given authority to carry out the terms of the plan and to apply to the Court for orders. (R. 60.) There is no flying in the face of the decisions in *Newhouse et al. v. Corcoran Irrigation District*, 114 Fed. (2d) 690, and *Lorber v. Vista Irrigation District*, 127 Fed. (2d)

628. Those decisions are doubtless correct but they are not in point. It would appear to make no difference whether Mr. Cook has the exact authority of a trustee in an ordinary bankruptcy proceeding or he has the authority which is given him by the Court in this case. Certainly it is too late for the appellees to raise questions relating to the interlocutory decree. Definitely it was contemplated that Mr. Cook as trustee might have to apply to the Court for orders and instructions.

There is another factual matter here which would make it appear that Mr. Cook's position is more like that of an ordinary trustee in bankruptcy. The contract and plan of composition in this case contemplated that *all of the assets* of Baxter Creek Irrigation District were to become assets to be administered by the trustee, and that is exactly what an ordinary bankruptcy trustee does. It might be said that the argument of appellees would point to distinctions without differences. (R. 73.)

The statement on page 13 of appellees' brief to the effect that nowhere are there provisions for the appointment or compensation of the trustee to succeed to the district's property would seem incorrect in view of the provisions of the contract (R. 73), the plan of composition itself providing that all such property shall be conveyed to the trustee and that he shall administer them. The Court's own provision in the interlocutory decree says the trustee shall if necessary apply to the Court for appropriate orders.

The argument of appellees that paragraph 16 of the interlocutory decree (R. 56) in enjoining the creditors from taking action against the land or properties of the district is fallacious. It is entirely obvious that this provision is for the purpose of preventing individual creditors, their agents, attorneys or others, from interfering with the operation of the plan or attempting to seize upon properties of the debtor. The plan of composition and the decree contemplate that the *trustee* shall actually take whatever steps are necessary to carry out the plan. He is ordered to do so. Further, appellees' urging of this provision as preventing the appellant from taking the step which he did take is entirely inconsistent with that portion of appellees' brief in which they urge that appellant has already delayed too long.

II. THE ORDER OF THE COURT IS APPEALABLE.

On this point, the case of *Burco, Inc. v. Whitworth*, 81 Fed. (2d) 721, at 728, is cited to support appellees' contention that the decision of the Court was clearly administrative and not judicial.

Now, it is apparent that a judicial decision where a controversy is involved is appealable. In the case cited the Court said (at 728):

"It has been held that when a court instructs its officers in a non-adversary proceeding, it acts in an administrative rather than in a judicial capacity and has a discretionary power to refuse

instructions, if a decision would materially and unwarrantably affect the right of interested parties.”

It goes on to determine that such is not the case there, so the decision is of little effect, particularly because the application in the instant case was very definitely opposed and resulted in a definite controversy and a legal decision. The Court did not act in the manner of exercising discretion but in the manner of deciding that the cause was *res judicata* by the *Pueblo Trading* case.

The case of *In re J. Rosen & Sons*, 130 Fed. (2d) 81, cited by appellees would appear at page 85 to support our contention that the order below was appealable.

While the word “instruction” was used in the petition to the lower Court in this matter, the word “permission” might just as well have been used. It seemed to appellant that it was proper procedure to apply to the Court for authority to pursue the remedy as suggested and to litigate the matter. Appellant doubts that it would have been good practice to have attempted to proceed directly without first asking permission of the Court. Notice also was required to be given to the district by the Court’s decree. (R. 60.) There was also the question in what forum the appellant should proceed, whether in the State or Federal Court. Therefore, it seemed appropriate that the matter should be brought to the Court’s attention and argued out and that the district should have an op-

portunity to appear and present its view. All of this resulted in an actual controversy, and it would appear that under the provisions of Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938, the issue is appealable, especially since these sections have liberalized appeals. The same general type of controversy would appear to be the subject matter of the appeal as in the case of *Hewit as Trustee in Bankruptcy v. Berlin Machine Works*, 194 U. S. 296, 24 S. Ct. 690.

III. THE COURT ERRED IN DENYING APPELLANT'S REQUEST.

Appellees make a somewhat astounding suggestion that the Court actually did pass upon the question of the exclusion of these lands by providing for a levy of additional assessment to pay the expenses of the composition, in paragraph XIX of the findings (R. 37, 38) and paragraph XV of the conclusions of law (R. 46-47) and paragraph 14 of the interlocutory decree. (R. 55-56.) Now these assessments were matters in which the Bondholders Protective Committee was only interested in the event the trustee should receive some of the land. It was almost exclusively a matter of interest and concern to the bankrupt to provide means for paying its own expenses in the proceedings. Since the matter of the determination of the status of the excluded lands was to be determined in a subsequent proceeding, it was not appropriate to provide for assessments upon these lands as to which the Court had not yet determined whether they were

within or without the district. No weight therefore should be attached to the argument of appellees in this regard.

Debtor's Exhibit 29 (R. 99) also falls short of supporting the claim of *res judicata* because the statements contained in Exhibit 29 were entirely self-serving, and in view of the withdrawal of Exhibit 30 (the record in the *Pueblo* case) and the absence of any finding on the matter of the excluded lands it must be deemed that Judge Welsh did *not* decide the point nor could Judge Foley do so without the *hearing* which appellant sought to have.

Appellees' argument goes around in a circle. They say at page 19 of their brief that the withdrawal of the documents (Exhibit 30) relating to the *Pueblo* case does not support the argument that the matter was to be determined in a later proceeding because, the language "If the U. S. District Court rules" these lands are not within the Baxter District, then, the lands are to be excluded from the exhibit. But appellees are faced with the fact that the record *was* so withdrawn and for the purposes stated, and that the U. S. District Court did not rule on the question of these lands.

The withdrawal was to avoid an appeal. The question of the appeal was not an appeal in the *Pueblo Trading* case but an appeal in the bankruptcy case itself. It may be that counsel who wrote this part of the brief did not fully understand what occurred at the trial. There was no question of appeal from the

orders in the *Pueblo Trading Company* case, but only a question of appeal from the interlocutory decree to be then entered in the bankruptcy case. When Mr. Dill himself said (R. 109): “* * * rather than hinder the approval of this plan, * * * I wish to withdraw them.” it was a question of appeal in the bankruptcy case that would interfere with the operation of the plan.

Appellees on page 25 of their brief explained their position. They do not and never have, they say, contended that the *Pueblo* case foreclosed the Court's consideration of the application for instructions, but merely take the position that the *Pueblo* decision would be *res judicata* in another proceeding, seeking to establish that the land was subject to assessment.

They place their whole case upon the theory that the Court was entitled to exercise discretion to forecast what might be the decision in the future case proposed to be filed by the trustee. Because the judge concluded that the decision would be against the trustee, he should not be permitted to litigate it, regardless of what forum in which the action might be brought or what Court would review any decision made. However, Judge Foley did not base his decision upon any such probabilities or improbabilities. He made his own decision that the matter was *res judicata*.

IV. APPELLANT HAS NOT BEEN GUILTY OF LACHES.

The interlocutory decree permitted (R. 60) landowners to litigate the matter involved at any time prior to April 24, 1947. This application was made to the Court by the trustee October 24, 1946. (R. 89, 91.)

V. THE LANDOWNERS HAVE THE RIGHT TO APPEAR IN THIS CAUSE.

This is conceded by the trustee. Obviously they have an interest in the controversy, or the title company whose attorneys appear nominally for the landowners do. But the trustee has an interest. It is not, as appellees' counsel slurringly suggest, a matter of fees for the trustee. It is a matter of his duty. He represents all of the creditors. They or their predecessors loaned \$1,300,000 to the district, and they may get back 10 or 15 cents on the dollar. They are from all walks of life; they have already lost much which they can never recover. Surely their interest is as substantial as that of the landowners or the title company. If counsel's description of the trustee as a "promoter" and a "perennial litigant" is intended to raise a prejudice against him in the eyes of this Court, appellant feels sure that this object will not be accomplished, and that the matter will be determined upon the law and the facts.

CONCLUSION.

Appellant respectfully submits that the order should be reversed.

Dated, Turlock, California,
October 1, 1947.

Respectfully submitted,
W. COBURN COOK,
Attorney for Appellant.



No. 11633

see vol. 2472
United States

Circuit Court of Appeals

For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY, a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

JUL 18 1947

PAUL P. O'BRIEN,



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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All of Butte, Montana,

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W. H. HOOVER,

R. H. GLOVER,

JOHN V. DWYER, and

SAM STEPHENSON, JR.,

All of Butte, Montana,

Attorneys for Appellant and Defendant.

In the District Court of the United States in and
for the District of Montana

No. 176

MRS. NELLIE ALLEN POAGUE, formerly NEL-
LIE ALLEN, also named ELLA ALLEN
POAGUE,

Plaintiff,

vs.

BUTTER COPPER AND ZINC COMPANY, a
Corporation,

Defendant.

AMENDED COMPLAINT

For an amended complaint, filed by leave of the
Court, the plaintiff complains and alleges:

1.

That at all times hereinafter mentioned, the plain-
tiff has been, and now is, a citizen of the State of
Montana, residing at Butte therein. That the amount
involved in this action at law, exclusive of interest
and costs, is in excess of the sum of Three Thousand
(\$3,000.00) Dollars, to-wit: The sum of Seven
Thousand (\$7,000.00) Dollars.

2.

That at all times hereinafter mentioned, Butte
Copper and Zinc Company was, and now is, a cor-

poration, organized and existing under and by virtue of the laws of the State of Maine, a citizen of the State of Maine, but at all such times doing business in Silver Bow County, Montana.

3.

That at all times since the 8th day of December, 1910, the plaintiff has been the owner of all of Lot number Four (4), and the North Ten (10) feet of Lot number Five (5), in Block number Sixty-seven (67) of the Original Townsite of Butte, Montana, according to the official plat and survey thereof originally filed with the County Clerk and Recorder of Deer Lodge County, Montana, later transcribed into the records of Silver Bow County, Montana, wherein the said property has been situated since the organization of said Silver Bow County.

4.

That since the said 8th day of December, 1910, at all times, the plaintiff has owned and maintained upon said Lot Four, and the North Ten Feet of Lot Five, a one-story brick veneer dwelling, consisting of six rooms, bath and central hall, with a frame addition in the rear, with a cellar with concrete floor, and side walls lined. Also a two-story, solid brick building 20 x 20 feet, and 17 feet high, with concrete foundation, at the rear of the lot; that the value of said buildings and the land, but for the acts of the defendant hereinafter alleged, would be the sum of Seven Thousand, Five Hundred (\$7,500.00) Dollars.

5.

That for a continuous period of time since July 19, 1917, the defendant, by itself, and by and through its agent, servant or partner, the Anaconda Copper Mining Company, has, by underground mining in the Emma, the Czarromah, the Nellie Quartz Lode Mining Claims, wrongfully destroyed and impaired the subjacent and lateral support of the plaintiff's said described lands, and both of the buildings thereon; that by reason of such mining, the defendant has caused cracks and leanings of all of the inside, and of all of the outside walls of both of said buildings; has caused the floors of both of said buildings to slope as much as six inches in the width of the front building, that building being the larger of the two buildings; has caused the walls and partitions of the said front building to lean as much as two inches; has caused the doors in said front building to bind; has caused major step cracks, vertical and horizontal, on the outside of the brickwork of the walls of the said front building; has caused both of said buildings to be a menace to life and limb of occupants, so that the same should, for the safety of the public, be razed, and the ground re-filled, which said razing of the buildings, and filling of the excavation, would cost the reasonable sum of Six Hundred (\$600.00) Dollars; that the defendant has thereby caused, since December 22, 1944, the plaintiff to expend for plumbing repairs to water pipes damaged by the defendant, Three Hundred, Sixty-one and 50/100 (\$361.50) Dollars, which was necessary and reasonable; the plaintiff

has been specially damaged by the defendant in such sums of Three Hundred, Sixty-one and 50/100 (\$361.50) Dollars, plumbing repairs, and Six Hundred (\$600.00) Dollars, necessary expense to raze said buildings, and fill excavation, to protect from injury pedestrians on the sidewalks in front of the same.

6.

That the said property of the plaintiff, before the injuries complained of, did have, and would now have, but for said injuries, a value of Seven Thousand, Five Hundred (\$7,500.00) Dollars; that because of said injuries done by the defendant to the plaintiff's property, the said property has no greater value than Five Hundred (\$500.00) Dollars.

7.

That at all times since July 19, 1917, the defendant, by certain partnership agreement, working contract, or lease, between defendant and Anaconda Copper Mining Company, the exact terms of said lease being unknown to the plaintiff, worked and operated the Emma, the Czarromah, the Nellie, the Welcome Stranger, and other quartz lode mining claims. The plaintiff alleges that the contract between the defendant and said Anaconda Copper Mining Company did not contain any provision whatever for the protection of plaintiff's property by the Anaconda Copper Mining Company, and that such work of the Anaconda Copper Mining Company, lessee, and the defendant caused the injuries hereinbefore set out to plaintiff's property; that no

part of the said sum of Seven Thousand (\$7,000.00) Dollars has been paid, and that defendant has damaged the plaintiff in such sum by reason of some, or all, of the acts above set out.

That said loss and damage to plaintiff having completely accrued, the plaintiff asks for interest from the date of filing this complaint, until paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Seven Thousand (\$7,000.00) Dollars, and for interest, and for her costs of suit.

EARLE N. GENZBERGER,
H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

Drawn by:

H. L. MAURY.

Service of the foregoing amended complaint is hereby acknowledged, and copy thereof received this 1st day of April, 1946.

W. H. HOOVER,
R. C. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.

[Endorsed]: Filed April 1, 1946.

[Title of District Court and Cause.]

ANSWER

Comes now the above named defendant, Butte Copper and Zinc Company, a corporation, and for its answer to the amended complaint of the above named plaintiff, heretofore filed herein, answers as follows:

First Defense

I.

Complaint fails to state a claim against this answering defendant upon which relief can be granted.

Second Defense

I.

Denies any knowledge or information thereof sufficient to form a belief as to any or all of the allegations contained in paragraph numbered 1 of said complaint.

II.

Answering the allegations contained in paragraph numbered 2 of said complaint, admits that at all times herein mentioned defendant, Butte Copper and Zinc Company, has been and now is a corporation organized under the laws of the State of Maine and that such defendant is a citizen of the State of Maine.

Denies each and every allegation, each and every part and the whole thereof contained in said paragraph numbered 2 not hereinbefore specifically admitted or denied.

III.

Denies any knowledge or information thereof sufficient to form a belief as to any or all of the allega-

tions contained in paragraph numbered 3 of said complaint.

IV.

Denies any knowledge or information thereof sufficient to form a belief as to whether or not since the 8th day of December, 1910, or at any time, or at all, plaintiff has owned or maintained upon said Lot 4 and the North 10 feet of Lot 5 a one-story brick veneer dwelling, or any building, consisting of 6 rooms, bath and central hall, with frame addition in the rear, with or without a cellar with concrete floors and side walls lined, or a two-story solid brick or other building 20 x 20 feet, 17 feet high, or of any other dimensions, with or without concrete foundation, at the rear of the lot or at any other place, or whether any building or buildings were situated entirely, or at all, on Lot No. 4 and the North 10 feet of Lot No. 5 in Block No. 67 of the Original Townsite of the City of Butte, Montana.

Denies each and every other allegation, each and every part and the whole thereof contained in paragraph numbered 4.

V.

Denies each and every allegation, each and every part and the whole thereof contained in paragraph numbered 5 of said complaint.

VI.

Denies that the injuries complained of, or any injuries, were caused by defendant.

Denies each and every other allegation, each and every part and the whole thereof contained in paragraph numbered 6 of said complaint.

VII.

Answering the allegations contained in paragraph numbered 7 of said complaint, denies that any act or thing done by this answering defendant has caused any injury to any property, building or buildings of said plaintiff in the sum of Seven Thousand Dollars (\$7,000.00), or in any other sum or amount, or at all; admits that no part of the sum of Seven Thousand Dollars (\$7,000.00) has been paid.

Denies each and every allegation, each and every part and the whole thereof contained in said paragraph numbered 7 not hereinbefore specifically admitted or denied.

VIII.

Denies each and every allegation, each and every part and the whole thereof contained in said complaint not hereinbefore specifically admitted or denied.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by virtue of her complaint and that defendant have judgment against said plaintiff for its costs of suit herein.

Demand of Trial by Jury

Trial by jury is demanded in the above entitled cause.

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,

Attorneys for Defendant,

Butte Copper and Zinc Company.

Address: 616 Hennessy Building, Butte, Montana.

Service of the above and foregoing Answer of Defendant, Butte Copper and Zinc Company, a corporation, acknowledged and copy thereof received this 20th day of April, 1946.

EARLE N. GENZBERGER,
H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 20, 1946.

[Title of District Court and Cause.]

MINUTE ENTRY OVERRULING FIRST
DEFENSE CONTAINED IN ANSWER

This cause was duly called for hearing this day on the first defense contained in the answer herein, Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. James T. Finlen, Jr., being present and appearing for the defendant.

Thereupon said first defense contained in the answer was submitted to the Court without argument and by the Court overruled. The defendant was thereupon granted an exception to the Court's ruling.

Entered in open Court at Butte, Montana, May 8, 1946.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

MINUTE ENTRY DENYING DEFENDANT'S
MOTION FOR DIRECTED VERDICT

Thereupon the jury was duly admonished by the Court and retired from the courtroom, whereupon defendant moved the Court to direct the jury to return a verdict herein in favor of defendant and against the plaintiff for lack of proof, the reasons being stated into the record. Thereupon, after due consideration, Court ordered that the motion be and is denied, to which ruling of the Court the defendant excepted and exception duly noted.

Entered in open Court at Butte, Montana, April 3, 1947.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

VERDICT

"We the jury in the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff's damages in the sum of Fifty-Five Hundred and no/100 (\$5500.00) Dollars, with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946.

HARRY HIGH,
Foreman.

[Endorsed]: Filed April 7, 1947.

[Title of District Court and Cause.]

JUDGMENT

This cause having been brought regularly on for trial before the above-entitled Court, the Honorable R. Lewis Brown presiding, with a jury duly impaneled and sworn, on March 31, 1947, plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, being present in person, and plaintiff being represented by counsel, H. L. Maury and Earle N. Genzberger, and the defendant being represented by counsel John V. Dwyer, James T. Finlen, Jr., and Sam Stephenson, Jr., and the trial having been continued from day to day, testimony on the part of plaintiff and defendant was concluded, and arguments of respective counsel having been made, said jury was duly instructed by the Court and having retired for deliberation did thereafter and on April 7, 1947, return into the Court with the following verdict:

(Title of Court and Cause.)

VERDICT

“We, the jury in the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff’s damages in the sum of Fifty-Five Hundred and no/100

(\$5500.00) Dollars, with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946.

HARRY HIGH,
Foreman.

Wherefore, by reason of the law and the premises, and in accordance with said verdict, it is ordered, adjudged and decreed, and this does order, adjudge and decree that the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, do have and recover from the defendant, Butte Copper & Zinc Co., a corporation, the sum of Fifty-five Hundred and no/100 (\$5500.00) Dollars, together with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946, amounting to date to the sum of Three Hundred Eighty-nine and 58/100 (\$389.58) Dollars, a total of principal and interest of Fifty-eight hundred eighty-nine and 58/100 (\$5889.58) Dollars, together with her costs in this action expended, hereby taxed in the sum of \$109.86.

Done in open Court this 8th day of April, 1947.

R. LEWIS BROWN,
Judge.

[Endorsed]: Filed April 8, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Mrs. Nellie Allen Poague, formerly Nellie Allen, and to H. L. Maury, Earle N. Genzberger and A. G. Shone, her attorneys:

You and Each of You are hereby notified that Butte Copper & Zinc Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 8th day of April, 1947.

Dated this 16th day of April, 1947.

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,
Attorneys for Defendant.

[Endorsed]: Filed April 16, 1947.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for Butte Copper and Zinc Company, a corporation, applicant herein, and it appearing that plaintiff's Exhibits 1, 8-a, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20-a, 20-b, 21, 22, 23, 24, 25, 26 and 27 and defendant's Exhibits 4 and 28 received in the trial of this cause should, by reason of their contents, be sent to the appellate court under Rule 75, Section i of the Rules of Civil Procedure.

It Is Hereby Ordered that all such original exhibits be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for

the Ninth Circuit and transmitted to the Clerk of said Court by mail with the record on appeal in said cause, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of said Clerk of said Circuit Court of Appeals.

Dated this 2nd day of May, 1947.

R. LEWIS BROWN,
Judge.

[Endorsed]: Filed May 2, 1947.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that heretofore and on May 2, 1947, the Court made an order directing that Exhibits 8-A, 9, 10, and 11 be sent to the Circuit Court of Appeals of the Ninth Circuit as original exhibits;

It further appearing to the Court that each of the exhibits is a writing, that there is nothing about the original exhibits that require inspection by the Circuit Court of Appeals, that they have all been incorporated in the transcript on appeal herein, and that the order of this court of date May 2, 1947, directing that said exhibits be transmitted to the Clerk of the Circuit Court of Appeals in their original form was made through inadvertence and mistake;

It Is Therefore Ordered and this does order that

the said order of the Court of May 2, 1947, concerning said exhibits, be and the same hereby is set aside and the Clerk of this court is directed to retain in his custody the said original exhibits and all of them and not to certify them to the Clerk of the Circuit Court of Appeals of the Ninth Circuit.

Done and dated this 13th day of May, 1947.

R. LEWIS BROWN,
United States District Judge.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Butte Copper and Zinc Company, a corporation, defendant above named, hereby and herewith designates the contents of the record on appeal in the above entitled matter as follows:

1. Names and addresses of attorneys of record.
2. Plaintiff's Amended Complaint.
3. Answer of Butte Copper and Zinc Company, defendant.
4. Minute Entry denying and overruling the First Defense in defendant's Answer.
5. Reporter's Transcript of testimony.
6. That portion of the Minute Entry dated April 3, 1947, contained in Paragraph 7 thereof, setting forth the Order denying defendant's motion for a directed verdict.
7. Verdict.

8. Judgment.
9. Notice of Appeal.
10. Order for Transmission of Original Exhibits.
11. Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely.
12. Certificate of Clerk of Court.
13. Statement of Points Upon Which Defendant Intends to Rely and Designation of Portions of the Record to be Printed Under Rule 19 (C.C.A.).

Filed herewith are two (2) copies of the Reporter's Transcript of the testimony taken in the trial of this case.

STATEMENT OF POINTS UPON WHICH
DEFENDANT INTENDS TO RELY ON
APPEAL

I.

The Court committed error in refusing to grant defendant-appellant's motion for a directed verdict because:

1. There was and is no evidence to support a verdict in favor of plaintiff and against the defendant.
2. There was and is no evidence to support a judgment in favor of plaintiff and against defendant.
3. There was and is no evidence that defendant performed any act or acts that could or did cause any damage to plaintiff's property.

4. The evidence was and is conclusive that defendant did not perform any act or acts that could or did cause and damage to plaintiff's property.

5. There was and is no evidence that defendant performed any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff's property.

6. The evidence was and is conclusive that the defendant did not perform any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff's property.

7. The evidence was and is conclusive that defendant was a Lessor of the property in which the mining alleged to have damaged the property of the plaintiff was performed; and that any mining performed was performed by a Lessee, and was not under the control or supervision of defendant.

II.

That the Court committed error in giving plaintiff's Instruction numbered 2 for each of the reasons set forth in Paragraph I above.

III.

That the Court committed error in giving plaintiff's Instruction numbered 3 for each of the reasons set forth in Paragraph I above.

IV.

That the Court committed error in giving plaintiff's Instruction numbered 5 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

V.

That the Court committed error in giving plaintiff's Instruction numbered 9 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

VI.

That the Court committed error in giving plaintiff's Instruction numbered 11 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive

and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

VII.

That the Court committed error in refusing to give defendant's Instruction numbered 1 for each of the reasons set forth in Paragraph I above.

VIII.

That the Court committed error in refusing to give defendant's Instruction numbered 12 for each of the reasons set forth in Paragraph I above.

IX.

That the Court committed error in refusing to give defendant's Instruction numbered 13 for each of the reasons set forth in Paragraph I above.

X.

That the Court committed error in giving that portion of its charge to the jury set forth as follows:

“If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the

Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.”

for each of the reasons set forth in Paragraph I above.

XI.

That the Court committed error in admitting the evidence of leaks, repairs or changes in gas mains or pipes and evidence of gas explosions over defendant's objections, and in refusing to grant defendant's motion to strike such evidence because:

1. There was and is no evidence that proved or tended to prove that said leaks, repairs or changes or gas explosions were due to or caused by any act or acts of defendant, its agent, servant or partner.

2. There was and is no evidence tending to show or prove that any such leaks, repairs or changes in gas lines or pipes or gas explosions were competent, relevant or material, or that they tended to prove or disprove any issue in

this case or that plaintiff sustained any damages thereby.

3. No cause was ascribed for the leaks, repairs or changes or explosions and no evidence was or is given upon which a conclusion as to the causes of such leaks or explosions could properly be predicated, and that the jury was permitted to speculate as to the reasons for and causes of said leaks, repairs or changes in gas lines and pipes and the reasons for or causes of said gas explosions.

XII.

That the Court committed error in refusing to give defendant's requested Instruction numbered 2 for each of the reasons set forth in Paragraph XI above.

XIII.

That the Court committed error in refusing to give defendant's requested Instruction numbered 3 for each of the reasons set forth in Paragraph XI above.

XVI.

That the Court committed error in refusing defendant's motion to strike the testimony of plaintiff Poague respecting leaks in the plumbing of her house and in refusing to grant defendant's requested Instruction numbered 14 because:

1. There was and is no evidence that said leaks were caused by ground movement due to mining.

2. There was and is no evidence tending to show or prove that facts regarding any such

leaks were competent, relevant or material or that they tended to prove or disprove any issue in this case.

3. No cause was ascribed for the leaks and no evidence was or is given upon which a conclusion as to the cause of such leaks could be properly predicated.

XV.

That the Court committed error in refusing to give defendant's requested Instruction numbered 15 because:

1. For each of the reasons set forth in Paragraph I above.

2. There was and is no evidence that the razing of the buildings was necessary.

3. The evidence conclusively shows that the razing of plaintiff's buildings was not necessary to protect pedestrians using the sidewalks as alleged in the complaint.

4. The allegation of the complaint that razing of the buildings was necessary to protect pedestrians on the sidewalks in front of said buildings and that the cost thereof was a necessary element of damages was wholly unsupported by the evidence and should not have been left for the consideration of the jury.

XVI.

That the Court committed error in refusing to give defendant's requested Instruction numbered 16 because:

1. The law does not make a Lessor of min-

ing ground liable for damages because of failure to include a covenant or agreement in its lease to the effect that the Lessee will support the surface of the ground.

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,
Attorneys for Defendant,

Butte Copper and Zinc
Company, a Corporation.
Address: Hennessy Building,
Butte, Montana.

Service of the foregoing Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely on Appeal acknowledged, and copy thereof received this 2nd day of May, 1947.

EARLE N. GENSBERGER,
H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1947.

In the District Court of the United States, in and
for the District of Montana, Butte Division

No. 176

MRS. NELLIE ALLEN-POAGUE, formerly
NELLIE ALLEN,

Plaintiff,

vs.

BUTTE COPPER AND ZINC COMPANY, a
corporation,

Defendant.

Appearances:

For Plaintiff: Earle N. Genzberger, H. L. Maury
and A. G. Shone.

For Defendant: W. H. Hoover, R. H. Glover,
John V. Dwyer, J. T. Finlen, Jr., and Sam Ste-
phenson, Jr.

BILL OF EXCEPTIONS

Be It Remembered, That the above-entitled cause
came on regularly for trial before the Honorable
R. Lewis Brown, Judge of the District Court of the
United States, in and for the District of Montana,
Butte Division, sitting with a jury, on March 31st,
April 1st, 2nd, 3rd and 7th, 1947, Messrs. H. L.
Maury and Earle N. Genzberger appearing as attor-
neys for the plaintiff, and Messrs. John V. Dwyer,
James T. Finlen and Sam Stephenson, Jr., appear-
ing as attorneys for the defendant.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the Court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing had and taken thereon, the following being all of the testimony and evidence offered or introduced on the trial of this cause, to-wit: [27*]

MRS. NELLIE POAGUE

the plaintiff, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name to the court and jury, Mrs. Poague? A. Mrs. Nellie Poague.

Q. And what was your name before you became Mrs. Poague? A. Allen.

Q. Nellie Allen? A. Yes, sir.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you live, Mrs. Poague?

A. At 415 South Dakota Street, Butte, Montana.

Q. And how long have you lived in Butte, Montana?

A. You mean how long have I lived in Butte, Montana?

Q. Yes.

A. Well, I been here over fifty years.

* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

(Testimony of Mrs. Nellie Poague.)

Q. And at 415 South Dakota Street for how long?

A. I have lived there for over thirty-five years.

Q. And are you the owner of the property known as Lot No. 4 and the north 10 feet of Lot No. 5 in Block 67 of the Original Townsite of Butte?

A. I am, and I bought it off of Mr. Andy J. Davis of the First National Bank; the old gentleman, not the young Mr. Andy.

Q. And that was in December, 1910?

A. Yes, sir. [28]

Mr. Genzberger: At this time we offer in evidence Plaintiff's Exhibit No. 1, a stipulation as to the ownership of the property of plaintiff.

The Court: Any objection?

Mr. Finlen: No objection.

The Court: It will be admitted without objection.

(Plaintiff's Exhibit No. 1, a Stipulation, was here received in evidence and is as follows:)

PLAINTIFF'S EXHIBIT No. 1

[Title of Court and Cause.]

Stipulation

It Is Hereby Stipulated by and between the Plaintiff and the defendant, acting through their respective counsel, that at all times since

(Testimony of Mrs. Nellie Poague.)

the 13th day of December, 1910, the plaintiff has been, and now is the owner of, and in possession of all of Lot Four (4), and the North Ten (10) feet of Lot numbered Five (5), in Block numbered Sixty-seven (67) of the Original Townsite of Butte, Montana, according to the official plat and survey thereof as originally and officially filed in the office of the County Clerk and Recorder of Deer Lodge County, Montana; said plat and survey having been transcribed into the records of Silver Bow County, Montana; excepting and reserving, however, all of the ores and minerals beneath the surface of the above described premises, with the right to mine for, and extract the same, and that this stipulation may be introduced in evidence in any trial of the above entitled cause.

Dated this 25th day of March, 1947.

EARLE N. GENZBERGER,
A. G. SHONE,
H. L. MAURY,

Attorneys for Plaintiff. [29]

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,
Attorneys for Defendant.

(Testimony of Mrs. Nellie Poague.)

Q. Showing you Plaintiff's Exhibit No. 2 for identification, Mrs. Poague, have you seen this document before? A. Yes, sir.

Q. Where did you get it?

A. From the First National Bank.

Q. Of this city? A. Of this city.

Q. And this is the deed you refer to from Andy Davis, Sr.? A. From Mr. Andy J. Davis.

Mr. Genzberger: We will offer in evidence Plaintiff's Exhibit No. 2 for identification.

Mr. Dwyer: To which the defendant objects on the grounds and for the reason that it has already been stipulated that the plaintiff is the owner of the property in question.

For the further reason that this deed contained a covenant of which the grantor was not in a position to give. If counsel wants to introduce the whole record then we will ask the severance deed and all others be introduced also. This is an attempt to introduce a covenant which is not in this case and for that reason we object to it.

The Court: Doesn't your stipulation cover the matter. Let me see your stipulation.

Mr. Maury: If that is counsel's idea of course we have [30] no purpose in putting the deed in.

Mr. Dwyer: If that deed goes in of course we would ask that the original deed severing the surface from the minerals be also put in evidence.

Mr. Genzberger: We have no objection to that.

Mr. Dwyer: This plaintiff has no greater title than her predecessor in interest had.

The Court: Well, it seems to me you gentlemen

(Testimony of Mrs. Nellie Poague.)

have stipulated and the stipulation covers it. In other words, it's agreed she is the owner of the property; that is, the surface but not the mineral rights. I think it's covered by the stipulation. The objection will be sustained.

Mr. Genzberger: We will ask for an exception.

Q. After taking possession of that house in 1910, Mrs. Poague, what did you do with it. What, if anything, did you do with the house after you first bought it?

A. Well, I fixed it up. It took me quite a while because I had no money and I was working for different gentlemen, Mr. George H. Casey for sixteen years; Mr. Jimmie King for twelve years; Mr. H. L. Frank for about ten years; Mr. Augustus Heinze, not steady; but off and on for about nine years, and Mr. Wilhelm. I worked for Mr. Jimmie Rowe sixteen years, done janitor work; and W. H. Orr and Mr. Cobban, I think that's the name, over here on Granite street; and W. H. Orr. And at one time I was working—you know it wasn't—it wasn't steady but that's how I paid for my home, was working.

Q. What was the nature of your duties?

Mr. Finlen: We ask that all of the answer following "I fixed it up but I had no money," be stricken as not [31] responsive.

The Court: Well, denied. It's harmless. Proceed.

Q. What did you pay for the house originally?

A. I paid \$3000.00.

Q. What was the nature of the house at the time you first bought it?

(Testimony of Mrs. Nellie Poague.)

A. My, it was awful. There was nothing there but the outside of the house made a splendid appearance, but outside of that the toilet was an out-toilet and there was even a well there when I bargained to buy the house.

Q. Then what did you do with it?

A. Well, when I got able I would talk to my bosses I was working for and things I wanted done like the water—— (interrupted).

Mr. Dwyer: We object to a rambling discussion about her bosses and who she worked for. It might be interesting.

Q. Just tell what you did?

A. And I worked a good many years and that's how I did; and the wiring of the house.

Q. State what you did?

The Court: What improvements did you make in the house. What did you put in there to improve the house?

A. I put in the water and bath and built on a bathroom and took another room and made it larger.

Q. (By Mr. Genzberger): Was there electricity in the house when you first bought it?

A. No, sir.

Q. Is there electricity there now?

A. Yes, there is electricity in it now. [32]

Q. Who put in the electricity?

A. Elderkin.

Q. I don't care about the contractor. Who paid for it?

A. Me; me.

(Testimony of Mrs. Nellie Poague.)

Q. Do you know how much you paid to put electricity in there?

A. The first time the house was wired it cost \$125.00.

Q. Then with reference to the bathroom and the addition you built to the other room of the house. You built two rooms after you bought it?

A. No, I built one room but I,—well, I built the bathroom from the ground on up but the other room I just remodeled it and made another room smaller.

Q. You divided another room?

A. Yes, sir.

Q. And you put in partitions and plaster and papered?

A. Yes, sir, and had a cellar dug part way underneath the house.

Q. You dug the cellar?

A. Yes, sir, I paid for that.

Q. What did you do with the well?

A. Well, I had a couple of men, you know, from time to time to bring rocks from different buildings. They were white men working and when they would have any rocks I told them to come and put them and fill up this well, and when I could I filled this toilet up. I had it cleaned out by the night man and I had the well filled in and I was advised by people that knew more than I did.

Q. Don't tell what somebody told you? [33]

A. To put lime around and sand.

Q. Do you remember what you paid for that?

(Testimony of Mrs. Nellie Poague.)

A. Gentlemen of the jury, and ladies, I have no idea but I know it cost me enough.

Q. What else did you do to the outside of the place?

A. Well, I had the house painted twice and two shingle roofs put on it and then I had a finish put on; well, I call it a paper roof.

Q. A composition roof. Is that what you had?

A. Yes, sir; and built on two porches and they were both torn down, and just as true as I sit in this chair I know it was nothing that tore them down but that Emma mine. Then I put up another one about six years ago when the WPA was just starting. Of course I didn't make the money on the WPA but that's the time I had it put up. I can remember that.

Q. Was there a fence in front when you first bought it? A. There wasn't a fence no place.

Q. And who built the fence?

A. Well, I got different contractors.

Q. What person paid for the fence?

A. Me. I paid for everything.

Q. And describe the fence that is in front of the property now? A. Now?

Q. Yes.

A. It's an iron fence up on a concrete foundation—I guess that's what you call it—about, oh, I will say the foundation in some places is,—I know it is higher than that (indicating with hands). [34]

Q. Indicating eighteen or twenty inches?

(Testimony of Mrs. Nellie Poague.)

A. Yes, sir; you know (indicating with hands).

Q. We can't get that into the record.

The Court: You got into the record an estimate of eighteen or twenty inches.

Q. What kind of sidewalks were in front of the house when you first bought it?

Mr. Finlen: Objected to as without the issues of the case. No issue as to sidewalks.

The Court: Overruled. Answer the question.

Mr. Finlen: Exception.

(Question repeated.)

A. Boards.

Q. Now, what kind of a sidewalk is there now?

A. Concrete that I put up by——

Q. Who built that sidewalk. Who paid for it?

A. I paid for it and Mr. Sivalon put it down. I paid for it.

Q. What kind of streets have you on Dakota street with reference to the nature of the roadway?

A. Well, they were all right for a while until——

Q. I don't mean that. When you first took over the property was there a dirt street or paved roads?

A. Oh, they were dirt streets.

Q. What kind of a street is it now with reference to improvements?

Mr. Finlen: We object to that on the ground that it's incompetent, irrelevant and immaterial; not within the issues of the case. No claim for damages to the street.

The Court: That's true but then it goes to the

(Testimony of Mrs. Nellie Poague.)

description [35] of physical surroundings of the property. Overruled.

Q. You may answer?

A. Well, the street was in fair condition.

The Court: He means by that was the street paved afterwards?

A. No, sir, Judge, it was just oiled, I believe. I think that's oiled but it's all wore off now from the trucks from the mine going up and down.

Q. By Mr. Genzberger): Is Dakota street paved?

A. No, sir, it's dust there.

Q. Was it oiled?

A. It was oiled but it's all wore.

Q. Who paid for the oiling of Dakota street with reference to your property?

Mr. Finlen: We object to that on the ground that it's not within the issues of the case; incompetent, irrelevant and immaterial.

The Court: I will sustain that. If it's an effort to show she paid for the city streets.

Mr. Genzberger: Exception.

Q. With reference to the alley between Dakota and Montana streets, the alley in the rear of your house; what, if anything, was the condition of that alley when you first became acquainted with the property? A. Nothing but dirt.

Q. What is it now?

A. Well, what ain't tore up from the mine.

Q. Before we go into that, what is the material in the [36] alley now? A. Concrete.

(Testimony of Mrs. Nellie Poague.)

Q. When was the concrete pavement put in the alley? A. I don't know how long that's been.

Q. Who paid for it?

A. I paid my part.

Mr. Finlen: Objected to as not within the issues.

The Court: Sustained. The answer will be stricken and you ladies and gentlemen of the jury are admonished not to pay any attention to the answer just given by the witness to the question.

Mr. Genzberger: You Honor is ruling the cost of the improvements for paving the street and alley is not within the issue of the case?

The Court: Yes.

Mr. Genzberger: That's the ruling?

The Court: Yes.

Mr. Genzberger: Very well.

Q. Now, Mrs. Poague, what else did you do with that house with reference to improvements?

A. Well, I had it wired and new doors and new windows put in where they were all broken out, and bath fixtures and toilet and wash basin and sink in the kitchen; and the house shingled twice and then I built on a back porch.

Q. What, if anything, did you build on that lot at the rear portion adjoining the alley?

A. What did I build?

Q. What?

A. Did you say what did I build? A garage, \$2750.00.

Q. When was that done? [37]

A. That was done in 1925.

(Testimony of Mrs. Nellie Poague.)

Q. And how much did the garage cost?

A. It cost \$2750.00. The concrete basement where I kept coal and used for a storehouse that's what—— (interrupted).

Q. Describe that garage, how was it constructed?

A. Well, there was two sets of doors for to come in on the alley and they were facing Montana street, the doors was; yes, that's right—— (interrupted).

Q. What kind of a floor?

The Court: Wait a minute until she answers the question. Give her time to answer one question before you put another.

A. A concrete floor in the basement. That was concrete and above that where the cars came in on are, I forget now how many inches Mr. Goddard said the floor was. It was the best we could buy or get at that time.

Q. Of what material were those floors in the garage made?

The Court: She said concrete.

Q. I didn't get it. And what were the walls made of? A. Well, brick; brick walls.

Q. Before we leave the garage, how many cars could be stored in that garage? A. Two.

Q. And what did you do with the garage after you had it completed?

A. Well, I rented it out to different men and especially one man by the name of Healy and he paid me \$15 because he occupied both sides, and Mr. Goddard told me [38] how much to rent the garage out for. There wasn't no garages around in

(Testimony of Mrs. Nellie Poague.)

town much when I put that up in 1925, and people that bought cars they wanted a good garage; and then I heard some—— (interrupted).

Q. Let's go back to the house. How many rooms were in your house?

The Court: Just a minute. You said \$15. For what period of time was that; was that \$15 a month or a week? A. A month, Judge, your Honor.

Q. \$15 a month?

A. Yes, and for about six or seven months I got that much out. Well, am I permitted to tell how the man that rented the garage, how I came to get this money?

The Court: If you are to tell that your counsel will ask the questions.

Q. (By Mr. Genzberger): Did you always get \$15 a month? A. No, sir.

Q. How much did you get later?

A. Well, I got \$5.00.

Q. For what?

A. \$5.00 aside for the garage; I got \$6.00 a couple of times and then I cut it down to \$5.00.

Q. \$5.00 for each side? A. Yes, sir.

Q. \$12.00 a month? A. Yes, sir.

Q. And then \$10.00 a month? A. Yes, sir.

Q. Now, then, have you been able to rent that garage the past two years? [39]

A. Oh, no, sir.

Q. Why not?

A. Well, every time Mr. MacPherson would take his car in he couldn't get out and I would have to

(Testimony of Mrs. Nellie Poague.)

get a carpenter to work on the doors and that kept from, kept up for about six or seven months; and Mr. MacPherson is a mail clerk on the Great Falls run and it was just putting out three and four dollars and two and one and five and six and I was only getting five dollars out of it. Then I told him that I wouldn't pay no more, pay for no more repairing to the garage.

Q. What happened to the garage?

A. Well, the mine happened to it.

Q. What happened. Tell the jury what happened to it. They never seen it?

A. Well, the doors to both of the garages are sunk in like that (indicating) and then going out like they are going to fall in the alley when the bricks fall, and then when I told Mr. MacPherson that the Lloyd block was torn down it's right close to me.

Q. Before going into that, what did you observe with reference to the garage and particularly the cement part first?

A. Well, the windows——

Q. What happened to the windows?

A. They couldn't get the windows open. You know when Mr. MacPherson couldn't get the windows open for, oh, quite a while and when he would be working on his car and doing anything he would have to leave the door open, and he didn't like to do that. [40]

Q. Go down below. What did you see happen to the concrete.

(Testimony of Mrs. Nellie Poague.)

A. It all cracked; it's all cracked, big cracks in it; big cracks—I guess you call it the north garage; the north side of the garage. The garage is sitting like this and the north side of the garage is all fallen in the basement and I had stored things in there and some was mine and some was other people's and I had to move out and I moved out just in time. It's all out; well, I guess you call it the north side, the upper side of the garage.

Q. What happened to the upper side of the garage with reference to falling in or out?

A. It's falling in the basement.

Q. When you said it you refer to the concrete or brick walls? A. The concrete.

Q. That's the concrete foundation?

A. Yes, sir; and the brick and the concrete foundation on the lower side of the garage. Well, the south side, I guess you call it, of the garage, it's all cracked, and the bricks—last Monday morning I know the bricks was cracked and last Monday morning when I went out to the ash can the bricks was all laying there, some on the south side in the yard and they were laying there. I was going to pick them up and I said, no, I am going to leave them there; I don't know what's going to happen and somebody might want to see them laying there, and I am sick anyhow and I just let them lay there.

Q. What else did you observe with reference to the [41] garage and concrete walls, particularly around the steps that lead into the lower portion of the garage?

(Testimony of Mrs. Nellie Poague.)

A. Well, as you go down the steps, why there is a wall and it's all cracked and the floors are cracked, all cracked. You can get your hand in there and the floor is all bulged up and the steps are in good condition; the steps, I think there are five of them—I know there is four—and they are all in first class condition, but the wall on the east side facing east is all cracked to pieces and it's fallen.

Q. When you speak of bulges in the floor do you mean the floor of the garage or the floor of the basement of the garage?

A. I mean the floor of the basement of the garage.

Q. Underneath the garage proper where you said there was room for two cars, how have you divided that basement of the garage?

A. Well, one I use for a coal house, the one on the north side; and on the south side I use for a storehouse and I was going to have that for a wash room but I never got around to do it. I had a chimney on the garage and it's all fell down.

Q. The chimney fell down?

A. Yes, sir; the chimney fell down.

Q. You had two rooms downstairs and room for two cars upstairs, is that right? A. Yes, sir.

Q. Going back to the house, Mrs. Poague, what did you observe first with reference to your house that was unusual? [42]

(Testimony of Mrs. Nellie Poague.)

A. Well, the doors; I was working and when I would go out I couldn't get in, and it wouldn't make any difference if I came home late at night I would have to go next door to my neighbor's and get them to come and help me to get in some way, and we would burst the window and catches on the windows and get in that way until I could get a key man down there to shore the doors off and get the doors fixed.

Q. What doors is this you are speaking of?

A. I am speaking of the front door, and its been chopped out and beat out so it's a disgrace.

Q. How many times have you had the front door fixed?

A. Well, gentlemen of the jury, and ladies, I don't know.

Q. More than one?

A. Oh, more than one; more than four or five times, and they were new doors and everything was in good condition. I got first class lumber or doors and windows whenever I would have to have anything done.

Q. After the man would fix the door the first time you could get in and out easily?

A. Yes, sir.

Q. And then what would happen?

A. I could get in and out for a while and then they would commence to sag down and the house would commence to sag down, and the front step there, and its all cracked right along there as you come in the front door; and by the front bathroom

(Testimony of Mrs. Nellie Poague.)

window by the porch its all cracked and the porch is gone down; I know, I know over two feet and its gone clear on down into the ground and I [43] put what I call a runner which you put on after you put your boards on. That's what I call it.

Q. What if anything did you observe on the windows?

A. Well, the glass on the windows is all leaving the windows from the top and the side, and in the front bedroom in the corner of one of the windows its cracked and I put a piece of tin in to hold it. It's cracked quite a bit; it's cracked like that and I believe I put a piece of tin in to hold it.

Q. Mrs. Poague did you notice anything with reference to the northeast corner of your building near the front windows. That's on the upper Dakota street side?

A. Yes, sir.

Q. Tell the court and jury what appears in the outside there?

A. You mean on the outside or inside?

Q. The outside first?

A. Well the bricks is, oh, it seemed like to me they have fallen to pieces and my house is leaning over on 413's house. That's right next to me, a two-story brick building, and the walls is going together.

Q. What did you find inside of where you found the cracks on the outside; what happened on the inside?

A. It's all bulged like that in the front room and in the dining room.

(Testimony of Mrs. Nellie Poague.)

Q. Before we leave the front room, what do you find on the inside of the front room?

A. The plaster is all zig-zaggy.

Q. Zig-zaggy. You mean cracked in a zig-zag form?

A. Yes, sir; and its bulging out and the plaster is falling from underneath, kind of leaving the lathes I [44] guess you call it.

Q. What happened to the paper you put in the front room? A. The paper?

Q. Yes?

A. Well, oh, it's all zig-zaggy. A couple or three years ago I had it all papered and its in a bad condition now from where the paper is all zig-zagging.

Q. What do you mean by bad condition?

A. I mean the paper is leaving the wall.

Q. What's under the paper as far as you can see. What has happened to the plaster?

A. I guess the plaster is what's causing the paper to bulge like it does.

Q. Can you see anything?

A. No, I can't see anything but the wall is, especially where the bay windows are they, oh, I just can't explain it like it should be, but it's there to be seen.

Q. Is there a crack across the arch of the bay window in the ceiling?

Mr. Finlen: Objected to as leading and suggestive.

The Court: Overruled. Answer the question.

A. What is the question?

(Testimony of Mrs. Nellie Poague.)

Q. Is there a crack across the arch of the bay window in the ceiling? A. Yes, sir.

Q. What have you noticed about your floors in the front room, if anything?

A. Well, I had—not lately, but I had new floors put in and I noticed they are raising up a little. [45]

Q. They are higher on one side than the other. Is that what you mean?

A. Yes, sir; and they seemed to be not raising up so much as going down.

Q. Are they even or uneven?

A. They are uneven.

Q. West of your front room you just described what kind of a room have you; going toward the back of the house?

A. Well, that's the dining room and the bedroom back there.

Q. What did you find in those rooms?

A. I came home from work about six years ago, off the WPA, and of course it was late at night when I got in, it was after twelve, and I had no more than got in bed when I heard an awful racket and I didn't have the strength to get up right away to see what the racket was but I know it was coming from the back side of the house, and then I did go and all the paster had fallen off the ceiling in the dining room.

Q. Now then, what did you do that time with the ceiling and dining room?

A. What did I do?

Q. What did you do to it?

(Testimony of Mrs. Nellie Poague.)

A. I got some men that was working on the WPA, when they wasn't working you know.

Q. What did you do with reference to repairing it?

A. They came and fixed it. I got the men to come and fix it and I got the plaster-board from the Iargey Lumber Company.

Q. You put plaster-board in that room? [46]

A. Yes, sir, in the dining room.

Q. What else did you do with the room that time, the dining room?

A. That's all it needed to be fixed.

Q. Did you paper the room then?

A. Yes. The Wonnacot paper hanging papered it.

Q. Then what did you discover later?

A. I discovered the water breaking so much, and right at Christmas time, you know.

Q. Before we get into the water. Now let's keep to the dining room?

A. Well, the plaster is bulging, oh, several inches. You can run your hand up.

Q. How long have you noticed that Mrs. Poague?

A. I noticed that for eighteen months or a couple of years now.

Q. And have you a chimney on the north side of the house?

A. Yes sir, but I haven't been able to use that chimney.

Q. Is there one there?

A. Yes, sir, and that heats the dining room.

(Testimony of Mrs. Nellie Poague.)

Well, in fact the whole house; the two bedrooms on the south side and the dining room and front room, but I haven't been able to have—this is the third winter I haven't been able to have a fire in the dining room.

Q. Why not?

A. The chimney was all cracked.

Q. When did that happen?

A. It just started in and kept on cracking more and [47] more and I was advised by workmen around me, the neighbors, for God's sake not to put a fire in there because if you do you will set your house on fire, and I said yes, sir, and I took their advice.

Q. This is the third winter that has occurred?

A. This is the third winter there hasn't been a spark of fire in the house.

Q. What has been the result with reference to the north half of your house?

Mr. Finlen: Objected to as outside the issues of the case.

The Court: It's not an element of damage but it's descriptive.

Q. What has been the result with reference to the north half of your house?

The Court: Re-frame the question.

Q. What have you been doing with the three rooms on the north side of your house?

A. Just covered up the furniture and let it stand there.

Q. Do you use them?

(Testimony of Mrs. Nellie Poague.)

A. I only just use them for the furniture standing in there because I can't have any fire.

Q. You haven't been occupying any rooms on the upper side as far as using them every day is concerned?

A. Oh, no. Oh, no.

Q. Back of the dining room what have you in your house on the north side?

A. It's a bedroom and the trunks and boxes and things from the basement is all piled in there and anybody that [48] wanted—I am not going to do it—could move them and see where the plastering has all fell off.

Q. What have you observed with reference to the back bedroom on the north side?

A. That's the condition its in.

Q. What?

A. I am using it for a store-room now; I can't rent it out.

Q. What have you noticed with reference to the walls?

A. Well, the kitchen chimney as I call it, there is cracks all through and cracks all in the bedroom, you know.

Q. Now with reference to the front of your house, what do you see on the outside of the brick work?

A. Well, right by the front door as you come in the door it's gone down, oh, I will say, well, a couple of inches, and I put a shingle in.

Q. Put a shingle in what?

A. In the side of the front door, in the wall; the

(Testimony of Mrs. Nellie Poague.)

brick wall where this crack is, and I put a shingle in it and I seen the shingle wasn't big enough. It was all right for a while and it kept on going down and I put a piece of board, a little piece of board thicker than that shingle.

Q. That's right by the front door?

A. Yes, sir.

Q. Going south of the front door what did you observe on the front wall?

A. Right by the windows where the woodwork is leaving the brick, the first window, the woodwork seems to be [49] leaving the window; and then the second window in the front of the bedroom, two windows in the bedroom, why it's all cracked in the corner. The bricks are all cracked.

Q. What else did you see on the outside of your house?

A. Then right around, I think it's the front bedroom where the bricks are all cracking—when they started in cracking they leave the red part and they get white. That's how I know that things is going; that's how I know.

Q. Now, Mrs. Poague, inside the front bedroom when did you newly paper that room last?

A. I papered that room last last fall.

Q. What did you observe with reference to the new paper?

A. It looks to me like it's bulging out as big as this, you know, as plain as this up here. (Indicating). Then right back of the door as you go in the bedroom and right back of there the plastering is

(Testimony of Mrs. Nellie Poague.)

all off and Wonnacot put plasterboard there and now it's all bulged; it's all bulged. It cost \$35.00 to have that room papered because I had so much fixing before they could put the paper on, and all over my bed is all cracked and I got window shades and one of my neighbors got old window shades and they said that's the best thing to put on the wall, and that south side window is all bulging again.

Q. Now then, this has happened since you re-paper the bedroom? A. Yes, sir.

Q. Before they re-papered you said they plastered it and fixed it up for you? [50]

A. Yes, sir; they done the best they could.

Q. And it opened up again?

A. Well, it's opening.

Q. How many cracks have you in your bedroom?

A. In my bedroom?

Q. Yes? A. Well, I got four.

Q. Where are they?

A. All in the ceiling except the one right behind the door as you go in.

Q. Where is the one right behind the door as you go in? A. Where is it?

Q. Yes? A. It's facing east.

Q. It's on the west wall then. Is that right?

A. The west wall? No, it would be on the east wall right by the front door but in my bedroom wouldn't it be.

Q. All right, you are right. How high above the floor is that crack?

(Testimony of Mrs. Nellie Poague.)

A. I don't know how high the what you call it, the wainscoating is real high.

Q. You mean the mop-board?

A. Yes, the mop-board.

Q. What have you located there?

A. The floor is kind of going down but the plasterboard is right on top of this.

Q. What, if anything, have you noticed about the floor of your bedroom?

A. It's kind of up and down like. It's got carpet on [51] it and it's not so noticeable, but still I notice it but anybody else wouldn't notice it.

Q. Has there been a change in the last few years on the level of that floor? A. Yes, sir.

Q. What was it before?

A. What was it before?

Q. What change did you notice?

A. When I put the furniture back in this place where I used to put it it will tip to me a little. The floor has been raised up.

Q. How long have you noticed that?

A. For about three years, and the bedroom as I go in, well, I got a man to come and shore that off because it was going down, the door was, and the transoms in the wall like that you can almost get your hand in between the transoms.

Q. When did that happen?

A. It's been happening all the time.

Q. What do you mean by all the time?

A. I mean it's going down more.

Q. Now then, back of your bedroom which you

(Testimony of Mrs. Nellie Poague.)

tell us is on the southeast corner of your building?

A. Yes, sir.

Q. That's the one you just described?

A. Yes, sir.

Q. Going back to the rear of your house what is next?

A. That's a bedroom, and when you go in the hall to this bedroom back of this front bedroom, from behind the door there is a crack there, oh, it will run almost the whole [52] length of that side; you call it, well, that side. (Indicating).

Q. That's the west wall?

A. Yes, the west wall.

Q. The wall toward the rear of the house?

A. And right up by the chimney in this back bedroom I call it it's cracked; well, I call it a slice of pie. It's cracked.

Q. You mean a triangular crack that comes down like a slice of pie?

A. Yes, sir.

Q. Two cracks come together?

A. Yes, sir. Over by the bedroom window the paper is all ruffled up and back of the dressing case I have swept up plaster and plaster until I just could——(interrupted).

Q. How long have you noticed the plaster falling in that room?

A. It's been getting worse every day, every day; and it's getting worse from that Emma mine; that mine and them trucks is what has wrecked it and I don't care who says that the mine ain't the cause of

(Testimony of Mrs. Nellie Poague.)

wrecking my house and they are not telling the truth.

Mr. Dwyer: We ask the argument of the witness be stricken from the record.

Mr. Genzberger: No objection.

The Court: It will be stricken.

Mr. Dwyer: We ask the witness be admonished not to argue.

The Court: I granted the motion.

Q. Mrs. Poague, going toward the rear again of this [53] bedroom what room is there in your house?

A. The kitchen.

Q. What did you find in the kitchen?

A. Well, when you come down the hall and cross the kitchen of that side.

Q. Indicating which side. Up the hall is north, toward the alley is west.

Mr. Finlen: I think Mrs. Poague demonstrated she knows the direction better than counsel.

The Court: Are you getting tired?

A. No sir, I am not getting tired, Judge, your Honor, but I am sick and I am nervous. No, I am not getting tired, Judge, your Honor.

(Whereupon, an adjournment was taken until Tuesday, April 1st, 1947, at 10:00 o'clock a.m., when the trial resumed with Mrs. Poague on the witness stand for further direct examination by Mr. Gensberger.)

The Court: Proceed, gentlemen, with the trial.

Q. (By Mr. Genzberger): Yesterday you fin-

(Testimony of Mrs. Nellie Poague.)

ished telling us about the back bedroom on the south side Mrs. Poague? A. Yes, sir.

Q. Did you finish all the cracks and bulges in that room? A. No, sir.

Q. Tell what other cracks or bulges there are?

A. In this room?

Q. Yes?

A. Well, the things I had to move out of the cellar into this room is all cracked and plaster is all falling and has been for quite a while, and I had the doors fixed so I could get in and out and I can't get the window up [54] at all; the roof is going down and I can't get the window up without forcing it and I may break it in there. After you go in the bedroom right here at this door the plaster is all off and I got it fixed up so a person couldn't see, and there is a door there and I got that door locked and can't get it open without forcing it and I don't need it.

Q. Where is this bedroom you are talking about now?

A. Well, you come into the kitchen and its right on the right hand side.

Q. You are talking about the north back bedroom? A. Yes, sir.

Q. Now then, let's go to the south back bedroom on the south side?

A. That's in the main part of the house. That's what you want?

Q. Yes. Tell the court about that?

A. There is a crack in the wall to the west and it's getting larger every day. The crack is just

(Testimony of Mrs. Nellie Poague.)

about to take up the whole entire side of the wall and it will only be a matter of a little while when it's going to cave in; and by the chimney, well, I will describe it the best I can. It's like a slice of pie; it's cracked across like that and getting larger every day, and the two windows in the south side, the two windows in this bed room, the plaster is all leaving and has been for quite a while and it's getting worse every day and nothing ain't doing it but the Emma mine.

Q. But the cracks are getting larger?

A. The cracks are getting larger.

Mr. Finlen: Just a moment. If the Court please, we [55] move to strike that portion of the answer as follows: "Nothing ain't doing it but the Emma mine" as not responsive to the question.

The Court: The motion is granted.

Q. What about the transom over the doorway in the bedroom to the south?

A. I got a paper there so the smoke and dirt can't get in between the transom. The transom runs longways like this over the door and I can't raise the transom up because the roof seems to be coming down and jamming it down and sideways, and I have a paper folded up on the left hand side of the door as I go in the door to keep the dirt and dust out the best I can.

Q. You mean the crack has developed on the left hand side of the transom as you go in the door?

A. Yes, sir.

Q. And you filled that up with paper?

A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. What has happened on the right hand side of the transom?

A. Just about the same thing. When you open the door it kind of drags and I got the neighbors when I had to get in there different times to come and take the door off and plane it so I could get in. Smith the keyman.

Q. The door has stuck from time to time?

A. Yes, sir, from time to time.

Q. Now then, we go to the kitchen. What do you find in the kitchen?

A. I guess you call it the west wall. I mean the east wall in the kitchen as you come down the hall of [56] that side from,—well, the moulding of the paper is all cracked and the floor is sinking down and the ice box and little cupboard I have on there lays right up against the wall and I put papers there so it wouldn't break the wooden back off of my cupboard behind it; also a piece of board to keep it kind of in place.

Q. And what, if anything, has happened to the kitchen doors?

A. They are just all chewed up. What I mean by that, chewed up, Judge, Your Honor, and the jury, what I mean when I say chewed up is it's been worked at so much and I couldn't get out and couldn't get in and been picked at so much with hammers and knives and I think I had a scissors a couple of times trying to get it open; and the locks on the doors—I have to have locks on the doors—and I would send for Mr. Smith when I

(Testimony of Mrs. Nellie Poague.)

had money, and when I didn't have any money, and he would always come and fix me up for a while and then it would get bad again.

Q. When you say get's bad you mean it sticks?

A. Yes, and I mean it sticks too. You have to take sledge hammers, axes and hatchets and everything to open it and raise it up.

Q. On the rear of the kitchen you have a back porch? A. Yes, sir.

Q. What material is that made of?

A. That's boards and plaster-board. The outside is boards and then there is paper in between, paper on that and then the plasterboards come. I got Mr. Shannon from the Iargey Lumber Company because I knew I could get [57] anything from the Iargey Lumber Company I needed.

Q. What did you notice with reference to the back porch I am talking about?

A. That's the back porch and it's going down and the windows are all sticking; there is five windows in there at \$7.50 apiece. The cellar door, now when you come in like this the cellar door is here to go to the cellar and you can't get the door up to get air in there; and when you go down into the basement the main part of the kitchen is down on the door and you can't open that door to get air to the cellar.

Q. In addition to the things you described on the inside of the house that you built, after you acquired the property what did you do with refer-

(Testimony of Mrs. Nellie Poague.)

ence to improving the outside of your house. I am referring to the room?

A. I had about seventeen loads of dirt hauled there from different buildings and I would see the men and I would ask them to dump that dirt and I will pay you for it, and they would do it; and I was working and if I could catch the men I would tell them to go down.

Q. What kind of dirt?

A. Well, they would be digging cellars out.

Q. What did you put on top of that dirt?

A. When I got able I had a man to come and bring me about five or six loads of black dirt and fertilizer and everything so I could have a nice yard.

Q. Did you have a lawn there?

A. I had a lawn in front and I had a lovely garden in the back when I was able to attend to it, but I haven't had one for two years because I haven't been able to put [58] the garden in and take care of it.

Q. Now have you ever had occasion to figure how much money, cash, you have invested in that house?

A. To tell the truth, which I am going to do, and nothing but the truth, I have spent—I don't care who don't believe it—I have spent Ten Thousand Dollars on that place.

Q. You know you have Ten Thousand Dollars in that place?

(Testimony of Mrs. Nellie Poague.)

A. I know I have spent Ten Thousand Dollars on that place.

Q. Mrs. Poague about the first part of December, 1944, what happened to the water pipes in that house?

Mr. Finlen: What year?

Q. Early in December, 1944?

A. They bursted; and in the last two or three years I been pretty sick. I don't like it.

Q. Let's talk about the plumbing.

A. I went down to the kitchen and I seen the water all over everything and I got dressed as soon as I could and I went out. I think it was kind of holidays or something, or Sunday or something when it bursted, and I studied for a minute where would I go to get a plumber. The water was still running in the cellar in places and coming out in the house and running in the house and I studied for a minute and got dressed and I thought——(interrupted).

Q. Well, did you have that fixed?

A. Yes, sir.

Q. How much did that cost?

A. Well I think that was a little job. I think that cost me a hundred, I think it cost about a hundred dollars [59] or a little more, and maybe it was a little less at this time. I know I paid it and I just can't remember.

Q. That was on or about December 11th, 1944?

A. Yes, sir.

Q. And who was your plumber?

(Testimony of Mrs. Nellie Peague.)

A. Mr. Billy Deworkin or something.

Q. He does business with the O'Brien Plumbing & Heating Company? A. Yes sir.

Q. Is that the bill you paid at that time?

A. Yes, this is one of them.

Q. How much is that? A. It's \$144.00.

Q. Now then, did you have another accident or incident to your plumbing immediately after that?

A. Yes, sir. There was a mail clerk coming up the street and I was in bed sick and he came and knocked on the door and said "Did you know your water pipe was bursted," and I said no, sir; and I looked out and I seen the water and then I sent for the plumber again.

Q. That was eleven days later, December 22nd, 1944? A. Yes, sir.

Q. How much was that bill?

The Court: If you are going to refer to documents you better have them marked.

Q. Have you any independent recollection without the bill. Can you remember the amount you paid without the plumbing bill?

A. No. I guess to tell the truth I can't, but I know I strained myself financially to pay these bills because [60] now since the war they don't do like they used to. They would wait until the first of the month and send you the bill but now you have to pay by the week and everything is by the week. If you can't pay this week's plumbing bill—that's the way they done me—they will just stop right there and you are just up against it that's all.

(Testimony of Mrs. Nellie Poague.)

Mr. Genzberger: Any objection to taking the five as one exhibit?

The Court: I certainly don't have any objection.

Mr. Finlen: No objection.

Q. Showing you plaintiff's Exhibit No. 3 consisting of five papers, "D" as the first exhibit and "E" is the second plumbing bill of December, 1944?

A. Yes, sir.

Q. Is that a bill you paid?

A. Yes, sir, \$187.50.

Q. That was paid to whom?

A. Mr. Billy Deworkin.

Q. O'Brien Plumbing & Heating?

A. Yes, sir.

Q. A year later in November did anything happen to your water, November 19th?

A. It was in November it broke. I think it was along or getting on to Thanksgiving or right close in there. I know it was cold weather.

Q. Did it freeze?

A. No, sir; just bursted.

Q. No freeze?

A. I went to Mr. Deworkin.

Q. Showing you plaintiff's exhibits No. 3-C, is that [61] the bill you paid that time?

A. Yes, sir.

Q. To the same plumbing company?

A. To the same Billy Deworkin.

Q. How much was that bill?

A. That bill was \$50.50.

(Testimony of Mrs. Nellie Poague.)

Q. That is the correct amount that you paid?

A. Yes, sir.

Q. Do you know of your own knowledge whether those amounts you paid the plumber were reasonable for the amount of the service and material they rendered that time?

A. Well, I guess according to the way the world is going I thought they was awful steep but that didn't hinder me from having to pay it, and I said to Mr. Deworkin I haven't got nothing.

Q. That was as cheap as you could get the work done that time was it?

A. Yes, sir, and I said I hope to God it will not break again.

Q. Now, Mrs. Poague, what did you consider the value of your property there assuming that there had been no damage done to it and if it was in the same condition it had been before the cracks started showing up?

A. I was so contented there and thought I had a home for life. I am getting away from the subject and I never gave a thought about selling it or anything. All I thought about was I had a home here for life and I am old and sick and I got a home.

Mr. Dwyer: We ask the answer be stricken as not responsive. [62] The witness should confine her answer to the question and it is encumbering this record with a lot of rambling.

The Court: The motion is granted.

(Testimony of Mrs. Nellie Poague.)

Q. Just answer the question. What do you consider your property worth? A. Now?

Q. No, before it was injured?

A. Well I considered my property was worth Ten or Twelve Thousand Dollars.

Q. Have you ever had an offer for it?

A. I had one offer about ten years ago from Mr. Alex Meagher, my neighbor, and he offered me—it was after 1925, and I know that because the garage is there; and Mr. Alex Meagher was a miner and he offered me Eight Thousand Dollars cash and of course I was married at that time.

Q. Did you accept it?

A. No, sir. I told him I would wait a while and see, and I didn't; but, oh, my Lord I am certainly sorry I didn't take it.

Q. Are you a citizen of the United States and of the State of Montana?

A. Yes, sir, and been in Montana for over fifty years.

Q. Now, Mrs. Poague, what is your property worth now in your opinion?

A. Well it ain't worth nothing to nobody else but me.

Q. You don't think you can sell it now?

A. I know I can't. I know I can't because it's so wrecked and I am wondering what to do. [63]

Cross-Examination

By Mr. Finlen:

Q. Mrs. Poague, before your name was Poague it was? A. Allen.

(Testimony of Mrs. Nellie Poague.)

Q. Mrs. Allen? A. Yes, sir.

Q. Miss Allen? A. Yes, Mrs.

Q. Before you married Charlie Poague you were married to a man by the name of Allen?

A. Sir?

Q. I say before you married Charlie Poague you were married to a man by the name of Allen?

A. Yes, sir; and he is dead.

Q. Charlie Poague is still alive?

A. Well, as far as I know and not being interested in anything I guess Charlie Poague is alive.

Q. What was your name before it was Allen, Mrs. Poague? A. My maiden name?

Q. Whether it was maiden or married name?

A. I only been married twice.

Q. What was your maiden name?

A. Bentley.

Q. I believe you testified in answer to Mr. Genzberger's question that you lived at 415 South Dakota St. for about thirty-five years?

A. Yes, sir. I think I have been there a little bit more, but that's close enough.

Q. Well, as a matter of fact, Mrs. Poague, you moved in when you bought the property in December, 1910. Isn't [64] that correct?

A. Yes, sir. Well, I didn't move in right away because McGuire the detective—— (interrupted).

Q. Well, within a few weeks?

A. Yes, and my boss told me I would take better care of the place and for me to move in there. I

(Testimony of Mrs. Nellie Poague.)

was working for Mr. George H. Casey that time.

Q. In other words, you have been in possession of the property since the latter part of 1910 or the first part of 1911? A. Yes, sir.

Q. Was the home a new home at that time?

A. No, sir.

Q. Do you know how old it was?

A. No, sir. I have not the slightest idea.

Q. Would you say that relatively speaking it was an old property?

A. Yes, sir, but it looked mighty nice on the outside and after I got it fixed up it looked mighty nice on the inside.

Q. After you acquired the property you installed a bathroom?

A. Yes, sir; put up by the contractor Mr. Turner.

Q. Do you know where he is now, Mrs. Poague?

A. Where Mr. Turner is?

Q. Yes?

A. I don't know. He may be dead, Mr. Finlen; I don't know. There is so many of the business men dying.

Q. When was that bathroom installed?

A. Oh, well—— (interrupted). [65]

Q. About, to the best of your recollection?

A. Well, it's been there for—I had it fixed as well as I can tell the truth, oh, around thirty years.

Q. And after you took possession of the property? A. Sir?

Q. After you took possession of the property in

(Testimony of Mrs. Nellie Poague.)

December, 1910, or January, 1911, you caused a cellar to be dug? A. Sir?

Q. After you acquired the property in 1910 you caused a cellar to be dug? A. Yes, sir.

Q. Did you pay for that cellar, Mrs. Poague?

A. Yes, sir.

Q. Who dug it?

A. Oh, I just can't think of the man's name that fixed my cellar; I just can't recollect.

Q. When was it dug?

A. That cellar was dug, I know it was dug after I had that bathroom fixed.

Q. Not exactly, but to the best of your recollection?

A. To the best of my knowledge I think that was along, oh, it was about '28; it was fixed before 1928 or about 1926 or 1925; along in there about when it was.

Q. Now that cellar consists of a hole under the kitchen about eight feet by eight feet would you say? A. Sir?

Q. It consists of a hole in the ground under the kitchen about eight feet by eight feet?

A. You mean that's the size of the cellar? [66]

Q. Well, I am asking you what it is?

A. Yes, sir.

Q. And around the edges of the hole are boards?

A. Yes, sir, and a concrete floor.

Q. And you built two porches on the house that were destroyed? A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. And about six years ago at the beginning of the WPA? A. I put—— (interrupted).

Q. You put a third porch on?

A. Yes, sir, at the back.

Q. That's the last porch?

A. That's the last porch.

Q. You are sure that that porch was erected or installed at about the beginning of the WPA projects in town?

A. Yes, sir, because I was working there and the man he laid down on me when I would be at work and that's what made it cost so much. He was Swedish.

Q. Who was the man, Mrs. Poague?

A. I don't know his name; he wasn't working and one of the head ladies up to the sewing room she got to talking to me one day and she told me about this carpenter, and he was Swedish, and was a good enough carpenter but he liked to lay down.

Q. Liked to take a little nip now and then?

A. Yes, sir. He had a path worn from the Johnson house over to my house and when I got home in the spring to clean up my back yard where I had some barrels out there with sand and stuff in them, and you know there was more [67] whiskey bottles and I guess you call it, well, you put soda and whiskey together and make some kind of a drink out of it. I don't know what it is because I don't drink myself.

Q. In any event, Mrs. Poague, the two porches

(Testimony of Mrs. Nellie Poague.)

that were destroyed were destroyed before you erected the last porch? A. Sir?

Q. I say that in any event the two porches which were destroyed were destroyed before you built the last porch?

A. Yes, sir; and this second porch that's on there now, on the front now, it's going down; it's leaving where it was close to the house and all around it's going down the ground.

Q. You testified yesterday, Mrs. Poague, I believe that you paid \$2750.00 for the garage in 1925?

A. Yes, sir.

Q. Who built that garage, Mrs. Poague?

A. W. M. Goddard.

Q. W. who?

A. W. M. Goddard, the contractor that put up the Elks home; that contractor.

Q. Walter Arnold? A. Sir?

Q. Walter Arnold was the architect on that?

A. Mr. Goddard had something to do with it too, didn't he?

Q. Is he here now?

A. Mr. Charlie Goddard, the old gentleman?

Q. Yes? [68]

A. I think I asked some white person not so long ago because I wanted to ask him several questions and they said I think he is dead, and I said, "Well, is his son doing contracting work" and whoever this white gentleman is I was talking to he said, "No, he is doing so and so." What I mean is he is doing something else; he is not following

(Testimony of Mrs. Nellie Poague.)

his father's trade; he is contracting on another kind of a job.

Q. In any event you paid \$2750.00 for it?

A. Yes, sir.

Q. Do you remember, Mrs. Poage, the taking of your deposition before a Notary Public, Joseph V. Flaherty, who is also reporting here today, on the 25th of February, 1946, in Butte, Montana?

A. Sir?

Q. Do you remember your deposition being taken by Mr. Flaherty? A. This gentleman?

Q. Yes? A. Yes, sir.

Q. And at that time did you testify that the garage cost close on to \$2100.00?

Mr. Maury: Show the witness the deposition, will you, Mr. Finlen.

Mr. Finlen: I am asking her whether or not she said that.

Mr. Maury: I am asking him to show the witness when he is using the paper. The witness must be shown the document.

The Court: Well, that's true if the counsel is referring [69] to it.

Mr. Finlen: The deposition, if the Court please, is not published.

The Court: He is asking the witness if she made a statement at any time and place. He has not referred to the document at all.

Mr. Maury: He is referring to a deposition that was taken.

(Testimony of Mrs. Nellie Poague.)

The Court: I will overrule the objection.

Mr. Maury: We except.

Q. And at that time did you testify that the garage cost close on to \$2100.00?

A. Gentlemen of the jury, and ladies, and Judge, your Honor, I don't remember of ever—I might have testified at that time but I always claimed and stuck to what I was told when the garage was put up it was \$2750.00 and if I said \$2150.00 well, I don't remember nothing at all about it.

Mr. Finlen: If the court please, we ask leave to publish the deposition of the witness.

The Court: Very well, that will be opened by the Clerk.

Q. Showing you, Mrs. Poague, what has been marked for identification as defendant's Exhibit No. 4 which purports to be your deposition?

A. Yes, sir.

Q. And directing your attention to the signature on page 22 of the instrument which purports to be the signature of one Nellie Allen Poague?

A. Yes, sir. [70]

Q. Is that your signature?

A. Yes, sir.

Q. Directing your attention to the following questions and answers on page 3 of the instrument, Mrs. Poague, were you asked at the time the deposition was taken before Mr. Flaherty on February 25th, 1946, the following question: "Q. The building on the back of the lot, you say is a garage?" And did you reply "It is a garage?"

A. Yes, sir, it's a garage.

(Testimony of Mrs. Nellie Poague.)

Q. And when you were asked "Of what is it made or constructed?" did you reply "Constructed of cement basement; that is what made it cost so much"?

A. Well, didn't I mention bricks?

Q. Was that question asked you that time and place, Mrs. Poague, and was that your answer?

A. Well, I said bricks and concrete.

Q. I am asking you if you answered "Constructed of cement basement; that is what made it cost so much"?

A. Yes, sir, I answered that.

Q. And were you asked "About how much did it cost, can you tell us?"

A. Yes, sir.

Q. And did you reply, "Well, as near as I can remember, it cost close on to \$2100"?

A. I don't remember that statement because I knew it cost \$2750.00.

Q. You read the deposition before you signed it, Mrs. Poague, didn't you?

A. Well, I am going to be truthful; I don't know whether I did or not. [71]

Q. Didn't you make certain corrections in ink after the deposition was shown you, and I direct your attention to page 3 showing an ink correction; I direct your attention to page 4 showing an ink correction; I direct your attention to page 11 showing an ink correction. Is that your handwriting?

A. Well, I guess I am guilty.

Q. Well, it isn't a question of guilt, Mrs. Poague. It's your handwriting, isn't it?

A. Yes, sir.

Q. Showing you a correction on page 14, is that your handwriting?

A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. And the signature "Nellie Allen Poague" of course is your handwriting? A. Yes, sir.

Q. Directing your attention to page 15 of the deposition, Mrs. Poague, when you were examined by your counsel, Mr. Maury, I will ask you whether or not you were not propounded the question, "Well now, how much did the garage cost you?"

A. You asking me a question?

Q. I am asking you whether or not that question was asked you? A. I believe it was asked me.

Q. And I am asking you whether or not your reply was not as follows: "It cost me as near as I can tell the truth and nothing but the truth, the garage cost something over \$2,000. The basement is what made the garage cost so much money." [72]

A. Yes, sir, but I said something over \$2000.00. I didn't say that \$750.00; I said something over. Wasn't that correct?

Q. That's correct, Mrs. Poague?

A. Yes, sir.

Q. Now you say it was over to the extent of a total cost of \$2750.00. Is that correct?

A. Over \$2750? No, I didn't.

Q. To the extent of a total of \$2750.00?

A. \$2750.00.

Q. Mrs. Poague, do you have any receipts or other evidences of what that garage cost or who did the work?

A. No, sir, Mr. Finlen. Oh, the story is too long for me to go into.

(Testimony of Mrs. Nellie Poague.)

Q. You can answer that story, Mrs. Poague, yes or no I believe?

A. Now ask me again; what was your question?

Q. Mrs. Poague, do you have any receipts or other evidences of what that garage cost or who did the work?

A. No, sir.

Q. Who was the last tenant in the garage?

A. Mr. Charles MacPherson who is a mail clerk from Butte to Great Falls and lived in the Lloyd apartments close to me.

Q. State, Mrs. Poague, if you know why he ceased to be a tenant?

A. Yes, I certainly can state that. Well, every time when he was on his vacation Mr. Charlie MacPherson would come in—I mean to go out of the garage with his car he would have somebody or get somebody to run around and [73] borrow tools from somebody to do something to the door, and that just kept up and kept up until I just got sick and tired of it and I said to Mr. MacPherson, I said, “Mr. MacPherson, this is the last time I am going to have anybody fix that garage”; not in a mean way, but I said, “I haven’t got the money and I am sick and can’t do it myself and if you want to stay in there and the door gets stuck so you can’t get in or gets stuck so you can’t get out you will have to tend to that for yourself and you can stay in there as long as you want to for nothing.”

Q. Mrs. Poague, I asked you to state if you knew why he ceased to be a tenant?

A. It was on account of the garage.

(Testimony of Mrs. Nellie Poague.)

Q. The condition of the garage?

A. Yes, the condition of the garage. He got tired of getting out and couldn't get in, and he couldn't get in and couldn't get out and he got tired and he told me his health was kind of failing him and him and his wife was going away.

Q. Directing your attention again, Mrs. Poague, to what's been marked for identification as defendant's exhibit No. 4 which is your deposition, and directing your attention specifically to page 7 I will ask you whether or not you were not asked at the time and place of the taking of that deposition with reference to Mr. MacPherson and with reference to his tenancy of the garage: "And when did he move out, do you know?" Were you asked that question? You better look at the deposition.

A. About when did he move out, do you mean?

Q. Were you asked, "And when did he move out, do you [74] know?" Were you asked that question?

A. I believe I was.

Q. And did you reply: "He has been gone about two years. He got transferred. He was a mail clerk on the road, and he got transferred to some place in California."

A. Yes, sir.

Q. Mrs. Poague, directing your attention to the second break of the plumbing in December of 1944 concerning which you already testified to when the mail clerk advised you of the break?

A. Yes, sir.

Q. Do you recall that incident?

A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. Where was that break, Mrs. Poague?

A. Well, I call it the street right where the water goes down and just at the end of the cement sidewalk, just close around in there.

Q. That wasn't on your property was it?

A. Sir?

Q. Was that on your property?

A. Well, whether or not it was on my property when I sent or telephoned to the Water Company about it running several men came down and they told me it was on my property and I would have to have it fixed. That's all I know.

Q. I am asking you with reference to your property line or fence, was it inside your fence or outside?

A. No, sir; it was outside; outside even at the end of the paved sidewalk, the paved walk that goes up and down Dakota. [75]

Q. That was in December of 1944?

A. Yes, sir.

Q. And the other leak concerning which you testified was also in December, 1944?

A. Yes, sir.

Q. Then you had a leak in November, 1945?

A. Yes, sir.

Q. Now, Mrs. Poague, you testified you have invested ten thousand dollars in the house?

A. Yes, sir.

Q. Do you have any receipts or other evidence of that?

A. No, sir. I did have a lot of receipts and kept

(Testimony of Mrs. Nellie Poague.)

them, but my goodness, if I keep all the receipts I got for paying out on that house I would have to come up here and get a box or something in the courthouse or government building.

Q. What was that?

A. I did have receipts at the time but if I continued to keep all the receipts where I paid out twenty-five, fifty, sixty and seventy cents and fifty and one hundred I would have to go to some place and rent some place to keep all them receipts in, and then I was told by business men after so many years and they had been paid why—— (interrupted).

Mrs. Poague, does this expenditure you told us about of ten thousand dollars, does that include all repairs to the property as well as improvements?

A. Sir?

Q. Does that include all repairs to your property as well as improvements? [76]

Q. For example, when you put on the bathroom that was an improvement? A. Yes, sir.

Q. That includes all improvements?

A. Yes, sir.

Q. And it also includes all repairs?

A. Yes, sir.

Q. Every time you painted the house it included that? A. Yes, sir.

Q. Every time you would re-shingle the house it would include that? A. Yes, sir.

Q. Does it include the furniture?

A. My God, Lord, no, sir; I bought the most of

(Testimony of Mrs. Nellie Poague.)

my furniture from Mr. Brownfield and Canty Furniture store, and Mr. Strassberger. I had my furniture before I moved, or if I hadn't had it I wouldn't have been able to pay for the home and furniture.

Q. Who did you buy most of it from, Mr. Brownfield and Canty or Mr. Strassberger?

A. Old man Mr. Strassberger.

Q. Was he in the furniture business?

A. He was in the furniture business and a grand old man to me. Of course he would let me have anything I wanted.

Q. Is that Mr. Strassberger's, your engineer's father?

A. Yes, sir; that's the gentleman.

Q. Well, I am glad to meet him. I met his son but I didn't know the old gentleman.

A. You didn't know the gentleman? [77]

Q. I didn't know the elder Mr. Strassberger. I know his son quite well.

A. Oh.

Redirect Examination

By Mr. Genzberger:

Q. Mrs. Poague, have you exhibited your house to representatives of the defendant in this action recently?

A. Yes, sir.

Q. To whom did you show your house?

A. You mean?

Q. From the Company?

A. Well, now I understand. Why Mr. Mike O'Connell is one and Mr. Bolever is another, and Mr. Mike O'Connell and Mr. Bolever each of them

(Testimony of Mrs. Nellie Poague.)

had gentlemen with them that I didn't know their names; I didn't know their name.

Q. Mr. Stephenson, this gentleman here. Was he down?

A. I believe that's the name, and Mr.—this gentleman here.

Q. Mr. Finlen?

A. Mr. Finlen was there. The first crowd that came down there was four in the crowd and there was one tall man dressed in blue clothes and I will never forget him.

Q. Do you know the names of anybody else that went down there? Last week who was down there?

A. Mr. Finlen and Mr. Stephenson were down there last week.

Q. Well, before that who was down there?

A. Mr. Bolever and Mr. Mike O'Connell.

Q. Mr. Bolever didn't come down from the Company did he? [78]

A. Yes, sir, because I asked; because I said, "Mr. Bolever, who sent you down here—— (interrupted).

Q. Did Mr.——

Mr. Finlen: We ask that the witness be permitted to finish her answer.

The Court: Very well.

A. And he said, "The Company"; and I said, "Yes, sir"; and that's all I said.

Q. Did you see Mr. Curtis down there?

A. Yes, Mr. Curtis.

Q. Which Mr. Curtis?

(Testimony of Mrs. Nellie Poague.)

A. Mr. John Curtis the real estate man.

Q. Who was with him?

Mr. Finlen: We object to this line of questioning.

The Court: Sustained.

Q. And you showed each of those people your house?

Mr. Finlen: We object to that.

The Court: Sustained.

Mr. Genzberger: That is all.

(Witness excused.) [79]

T. L. DORAN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name?

A. T. L. Doran, 614 West Galena St.

Q. In the City of Butte? A. Yes, sir.

Q. What is your official position?

A. Division Manager?

Q. Of what?

A. The Montana Power Company.

Q. And as Division Manager of the Montana Power Co. what are your duties?

A. I have charge of the operation for the Company in this area.

Q. What does the Montana Power Company sell in this area?

A. Electricity, gas and steam.

(Testimony of T. L. Doran.)

Q. Is there a separate company that has charge of distribution of gas or is it all Montana Power Company?

A. It's the Montana Power Company.

Q. And as such then you have jurisdiction over the gas distribution system in and around the City of Butte?

A. I do, yes.

Q. And particularly in that area in the City of Butte which is bounded on the south by the south sideline of Aluminum street, bounded on the north by the north sideline [80] of Silver street, bounded on the east by the east sideline of Main street and bounded on the west by the west sideline of Idaho street?

A. That's a part of our distribution system.

Q. You have jurisdiction over that particular area I described?

A. It's a part of the town distribution system.

Q. And in what manner is gas distributed within the City of Butte and particularly the area I just described?

A. Pipe lines.

Q. What kind of pipes?

A. What do you mean by what kind?

Q. Steel, wood, composition?

A. Steel pipe.

Q. What kind of gas?

A. It's natural gas.

Q. Where are they placed with reference to the surface of the ground. I am speaking of the pipes for gas distribution?

A. Below ground.

Q. How far below?

(Testimony of T. L. Doran.)

A. I think that probably would vary in some localities, but I am not sure what the depth is in that particular area.

Q. Do you know the size of the gas main that runs north and south on Dakota street between Silver and Aluminum streets? A. I do not.

Q. You don't know the diameter?

A. No, sir. [81]

Q. Do you know the diameter of the mains on Porphyry street? A. No, sir, I do not.

Q. Have you brought with you a record of the service calls caused by injuries or a necessity for repairs in the district which I have heretofore described?

A. I have the orders I believe that are called for in the subpoena that was handed to me.

Q. In what way have you arranged them, Mr. Doran; by streets or by dates?

A. No, I have them by dates.

Q. You prefer to give them to the court and jury by dates?

A. Whichever way you want them.

Q. What is the first service call you have a record of for this area?

A. March 29th, 1940, looks like the first one.

Q. Where is that call?

A. If you will wait for just a moment here.

Q. Certainly.

A. That call is at 435 Colorado street.

Q. On what date, 3-29-40? A. 3-29-40.

(Testimony of T. L. Doran.)

Q. Do you know where 435 Colorado street is with reference to 415 South Dakota street?

A. It's about a block—Colorado would be a block east.

Q. What did you do at 435 Colorado street. When I say you I mean the repairmen from the Montana Power Company insofar as their records and reports to you show?

Mr. Finlen: To which the defendant objects on the [82] ground and for the reason it's incompetent, irrelevant and immaterial; on the further ground it does not prove or tend to prove or disprove any issues in the case. Upon the further ground it's too remote with reference to time. On the further ground it's too remote with reference to place or location; and upon the further ground there is no proper foundation laid to connect the incident or the call with any issue of this case with reference to the calls.

Mr. Maury: We shall show by testimony to be hereafter introduced that a settling of ground breaks gas mains and other mains.

The Court: Well, it's impossible for me to tell at this time from the question as to the materiality of the evidence. So it may or may not be, depending upon the answer of the witness, in my opinion. The objection will be overruled.

If after the answer is made it doesn't appear to be material, of course a motion to strike will be in order.

Mr. Finlen: To save time and not to encumber

(Testimony of T. L. Doran.)

the record may our objections as interposed to this question be interposed to all questions relative to the Montana Power Co.?

Mr. Maury: We agree to that.

The Court: Yes, and the same ruling will be made subject to the same right as to a motion to strike.

Mr. Finlen: And the defendant may in each case be considered to have an exception.

The Court: Very well, an exception will be granted to the ruling of the court. Proceed with the witness.

Q. What did you do at 435 Colorado Street. When I say [83] you I mean the repairmen from the Montana Power Company insofar as their records and reports to you show?

A. Well, the order reads "cut line and install dresser coupling."

Q. Can you tell the court and jury what is a dresser coupling?

A. Well, I am not an engineer but it's called an expansion sleeve. They vary in size and it's put on there to allow for pipe expansion.

Q. I don't think an engineer could have done better, Mr. Doran. Mr. Doran, I neglected to ask you and I will ask you now whether these records are kept by the Montana Power Company in the ordinary course of business?

A. Yes, they are.

Q. Are they true and correct?

(Testimony of T. L. Doran.)

A. To the best of my knowledge and belief they are.

Q. They represent the facts as reported to your office by the men in the field?

A. Yes, the original order is taken by the service crews.

Q. And the reports are made by the service crews back? A. Yes, sir.

Q. That's the regular course of business of the Montana Power Company?

A. Yes, sir; they are regular routine.

Q. They are regular routine records kept by the Montana Power Company in the ordinary course of business? A. Yes, sir.

Q. What is the next call you have in your record in this area? [84]

A. I think it's 522 South Montana street. 522 So. Montana street.

Q. What date is that? A. June 28th, 1940.

Q. Where is 522 South Montana with reference to 415 South Dakota street?

A. A block west and a block south.

Q. And what was the nature of the repair there?

A. They installed an 18 inch nipple and dresser coupling.

Q. 18 inch? A. Yes.

Q. That's also an expansion joint?

A. Yes, sir.

Q. Where is the next call, and when?

A. 652 South Dakota.

Q. What was that date?

(Testimony of T. L. Doran.)

A. That's on September 30th, 1940.

Q. What was done down there?

A. Installed three quarter by twelve inch dresser coupling.

Q. I didn't get the diameter?

A. Three quarter inch by twelve inch.

Q. That would indicate a twelve inch main at that place, would it not?

A. No, that's what I mentioned before. These expansion sleeves are in various sizes and that would be three quarter pipe size by twelve inch in length.

Q. That allowed for expansion up to twelve inches?

A. No, that's the size of the dresser. We don't allow [85] it to that expansion.

Q. Where is 652 South Dakota with reference to 415 So. Dakota?

A. It would be two blocks south.

Q. When is the next date, and where?

A. 202 West Gold street, and that's on November 3rd. Wait a minute. It looks like an eleven and six. This is on April 3rd, 1940.

Q. What was done at 202 West Gold street?

A. Dug surface up and installed dresser stub and new curb box, new curb cock.

Q. Have you anything on there to show the nature of the injury to your line?

A. Just the nature of the call as service broken serving 202 and 204 West Gold. Curb box run over.

(Testimony of T. L. Doran.)

It doesn't say by whom. Evidently somebody drove over the curb box.

Mr. Maury: We move to strike that out. That is not relevant.

The Court: The motion will be granted. The jury is admonished to pay no attention to this particular call.

Q. Where is the next one, Mr. Doran?

A. 115 West Porphyry.

Q. 115 West Porphyry?

A. Yes, on August 22nd, 1941.

Q. Now what is the—what caused the injury?

A. Water Company digger pulled service out of dresser.

Mr. Genzberger: We will withdraw that one, your Honor.

The Court: Very well.

Q. Pass to the next one?

A. The next one is 525 South Dakota, October 10, 1941. [86]

Q. What did you do there?

A. Well, that happened to be a fire there and the note on here is three quarter inch riser from meter cock broken off at the upstream side of three quarter by one house regulator and the service was shut off there.

Q. When and where is the next?

A. 475 South Montana.

Q. And what date?

A. November 4th, 1941.

(Testimony of T. L. Doran.)

Q. What did you find there; what was the cause of it, of the call?

A. Gas leaking through hole in three inch main near service connection.

Q. What was done?

A. Installed three inch dresser leak clamp.

Q. And where was the next one, and when?

A. 522 South Dakota. That's on January 29th, 1942.

Q. What was done there?

A. Found leak in short Dayton couplings seventeen feet east of meter set and installed thirty feet of new service, eliminating one Dayton coupling and one threaded coupling; one ninety degree "L".

Mr. Finlen: That's 522 South Dakota?

A. No, South Idaho.

Q. (By Mr. Genzberger): You gave us Dakota?

A. I am sorry, that's 522 South Idaho.

Q. When and where is the next one, Mr. Doran?

A. 634 Colorado on 5-11-42.

Q. What was the cause of the one there?

A. Found leak on coupling; installed new three quarter [87] by twelve dresser coupling.

Q. Where was the next one?

A. 632 South Dakota.

Q. When was that one?

A. That's on June 5th, 1942. The nature of the call was leak in coupling; cut out coupling and installed three quarter dresser coupling.

Q. When and where is the next one?

A. Rear of 678 South Dakota.

(Testimony of T. L. Doran.)

Q. What was that date?

A. That's on October 7th, 1943.

Q. What did you do there?

A. Installed three quarter by twelve inch dresser coupling.

Q. And what is the next one?

A. 322 South Montana street.

Q. What was that date?

A. This is on 11-1-43.

Q. What was found there?

A. Leak on service line outside of the building.

Q. What was done there?

A. Service line pipe replaced with a wrinkled bend and dresser coupling.

Q. What is a wrinkled bend?

A. That I can't answer; I don't know.

Q. Have you forgotten what that is, Mr. Doran?

A. I had no occasion to forget about it. I didn't know what it was to start out with.

Q. What is the next? Wait a minute. On that, Mr. Doran—go on with the last repair. On that last repair [88] the pipe originally was straight at that place 322 South Montana?

A. I assume that it was.

Mr. Finlen: We ask the answer be stricken.

The Court: Granted.

Q. When was this gas line and service line installed in this area of Butte, Mr. Doran?

A. You mean the entire area?

Q. Yes. When was it put in new?

A. It was put in in 1931.

Q. 1931?

(Testimony of T. L. Doran.)

A. Yes, in the summer of 1931. Generally, that is when the distribution system was installed. As to any particular service installation—— (interrupted).

Q. That would have to come after that date?

A. They would come after that date.

Q. The distribution system was built new in the summer of 1931? A. That's right.

Q. Is there anything on or about the last report that you read at 322 South Montana street which shows to your mind a change in direction of the service line?

Mr. Finlen: We object to that on the ground and for the reason it calls for conjecture, speculation and guess; on the further ground that it calls for information not within the knowledge of the witness.

On the further ground that it calls for information that without any showing that the witness is qualified to give this information.

The Court: I think the objection as made will be [89] overruled. There may be some writing on the report itself which says there has been a change in the direction of the pipe line, I don't know. There may be some writing by persons or repairmen that there has been some change in direction. If there is the witness can testify.

A. There is no notation here on the change of the direction.

Q. Nothing on the report showing a straight

(Testimony of T. L. Doran.)

pipe before the accident was changed to a curve pipe after the repair?

A. I read the notation that's shown on here. I read the notation shown on here that it was service line fittings removed from service line and pipe replaced with a wrinkled bend and dresser coupling.

Q. The wrinkled bend is a crooked pipe, is it not? A. I said I don't know.

Q. When is the next one?

A. February 22nd, 1944, 112 West Platinum street.

Q. What was done there. What was the cause of the call there?

A. An expansion there. Thread on two inch main—that's two inch I imagine and I don't know whether that's the main or service—broken on downstream side of valve. Leak repaired with pipe clamp.

Q. And where is 122 West Platinum with reference to 415 South Dakota street?

A. I said 112 West Platinum.

Q. 112, excuse me.

A. Approximately two blocks south.

Q. When and where is the next?

A. 316 South Idaho street on December 20th, 1944. [90]

Q. What did you find there?

A. Service line broken outside of house. Line repaired and put back in service.

Q. When is the next one?

A. January 17th, 1947.

(Testimony of T. L. Doran.)

Q. Where was that?

A. 413 and 415 South Montana street.

Q. Where is that with reference to 415 South Dakota street?

A. A block west and two blocks south. No, it's about a block west.

Mr. Finlen: What address?

Mr. Genzberger: 413-15 South Montana street.

A. January 13th, 1947.

Q. What was the cause of the call there?

A. Service line was pulled out of dresser coupling. The adjustment was made and installed three quarter inch by twelve inch dresser coupling.

Q. When is the next one?

A. That is all the calls we have on services and mains in that area.

Cross-Examination

By Mr. Finlen:

Q. Mr. Doran, with reference to the call at 112 West Platinum street? A. Yes.

Q. You testified that was approximately two blocks south from 415 South Dakota street?

A. It's about a block and one-half.

Q. South, and how far east? [91]

A. It wouldn't be east. It would be west of Dakota street.

Q. How far west then?

A. I think it would be about a half a block. I don't know whether that's a through street that's running through there or not. It's between Montana and Dakota on West Platinum.

(Testimony of T. L. Doran.)

Q. Directing your attention to the call at 475 South Montana street? A. 475?

Q. Yes. Does the record concerning that call show anything with reference to the cause of the leak? A. Leak caused by electrolysis.

Q. Excluding that call and directing your attention to the other calls concerning which you testified on direct examination do the records show anything with reference to the cause of any one or more of the various leaks? A. No, they do not.

Q. To what area was your attention directed, Mr. Doran, stating it for the benefit of the jury in terms of blocks?

A. Well, that would be about three blocks south from Silver street to Aluminum, and it would be—— (interrupted).

Q. Wouldn't it be more than that, Mr. Doran? Silver to Porphyry, to Gold, to Platinum, to Aluminum?

A. I was starting—— (interrupting).

Mr. Maury: Isn't the call in his hand. Have you got the call there?

A. Yes, from the south side of Aluminum to the north side of Silver street. That would be Porphyry, Gold, Platinum and Aluminum. It would be four blocks south. [92]

Q. (By Mr. Finlen): That would be five, wouldn't it; Silver, Porphyry, Gold, Platinum and Aluminum?

A. If you want to take Silver in.

(Testimony of T. L. Doran.)

Q. That's the north boundary, isn't it?

A. The north side of Silver street.

Q. And how many blocks east and west?

A. Four.

Q. What are the west boundaries, Mr. Doran?

A. The east side of Main street and the west side of Idaho street.

Q. Now the street immediately west from Main is what? A. Colorado.

Q. And the street immediately west from Colorado is what? A. Dakota.

Q. And the street immediately west from Dakota is what? A. Montana.

Q. And the street immediately west from Montana is what? A. Idaho.

Q. And during what period of time was your attention directed?

A. Commencing with December 1st, 1939, and ending March 20th, 1947.

Redirect Examination

By Mr. Genzberger:

Q. Mr. Doran, the property Mr. Finlen inquired about at 112 West Platinum is practically due south about a [93] block and one-half from 415 South Dakota, is it not?

Mr. Finlen: South by streets or by the compass?

Mr. Genzberger: Due south by the compass?

A. It would be Gold—it would be about a block and one-half south and then probably a half—it's a short block on Platinum.

(Testimony of T. L. Doran.)

Q. It's east of the alley or east of Placer street which is on a line with the alley on the rear of the property at 415 South Dakota street?

A. It's what?

Q. The alley that runs in the rear of 415 South Dakota if extended south would be the street known as Placer street on the corner of which 112 West Platinum is located?

A. I don't know that. I know there is a corner street there.

Q. That's the house you are speaking of where the house is completely demolished? A. Yes.

Q. That's on the corner of Placer and Platinum?

A. Yes, sir. The order shows two. Both addresses I believe that show the order came in from Platinum and Dakota.

(Witness excused.)

(Whereupon, a recess was taken until 2:00 o'clock p.m., same date.) [94]

C. L. KAUDY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name, Mr. Kaudy?

A. It is.

The Court: Tell us your name?

A. C. L. Kaudy.

(Testimony of C. L. Kaudy.)

Q. (By Mr. Genzberger): Where do you live?

A. 729 South Dakota street.

Q. What city? A. Butte, Montana.

Q. What is your business?

A. I am carpenter contracting.

Q. Where have you been carrying on that business? A. All over the City of Butte.

Q. For how long?

A. About twenty-two years.

Q. What has been the nature generally of your business?

A. Remodeling and building new buildings and all of that kind of work; any kind of work that comes up in the line of carpenter work.

Q. In the line of building? A. Yes, sir.

Q. Have you had occasion to visit the property of Ella Poague at 415 South Dakota street in Butte?

A. I have.

Q. How often have you been there? [95]

A. Oh, I would say three or four times.

Q. Within what period of time?

A. Possibly a year apart; a year or six months apart; somewhere in there. I can't just recollect.

Q. Are you able from your examination of that building to give us your estimate of the value?

A. Yes.

Q. State what would be the sound value of the building, both buildings. I mean the front building and garage at 415 South Dakota street in Butte if it were not for the injuries that are now on said property?

(Testimony of C. L. Kaudy.)

Mr. Dwyer: To which we object as being incompetent, irrelevant and immaterial. The sound value is not the tested value in this case and the witness hasn't shown himself qualified to give sound value.

Q. I can qualify him further. I will withdraw the question for the time being. State, Mr. Kaudy, what you found with reference to the building as to the number of rooms, its construction, its size, etc.?

A. Well, I can't just remember the size. I don't believe I have that size right here. I don't believe I have it here, but the construction of the building being a brick veneer building, a six room dwelling, I believe I placed—— (interrupted).

Q. Wait a minute. Don't say any values yet. A six room, and in addition to the six rooms was there a bath?

A. There is a small addition in the rear end.

Q. For a bathroom? A. Yes, there was.

Q. And was there a back porch built on the six rooms? [96] A. Yes, there was.

Q. What did you find on the rear of the lot?

A. You mean in the nature of a garage?

Q. Yes?

A. I found a garage back there. I don't recollect the size of that garage at this time but that it was a brick garage and had a good concrete foundation, concrete floors down in the basement; and it had a wood construction floor for the second floor where the cars came in. It was a nicely built building at

(Testimony of C. L. Kaudy.)

the time it was built, and I think I have it here built around the year 1925.

Q. That was what, the garage or house?

A. That was the garage.

Q. Were you in business in Butte in 1925?

A. I was.

Q. Have you any idea what would be the reasonable cost of erecting and constructing that garage in 1925 in the City of Butte, Montana?

Mr. Finlen: We object to that on the ground and for the reason it calls for a conclusion that the witness has not shown himself qualified to give. He testified *he been* in the business about 22 years.

A. I been in Butte, Mr. Finlen, more than twenty-five years.

The Court: He testified he is a building contractor and carpenter. I think he is qualified; for the number of years in Butte I think he is qualified to testify what the reasonable cost of erecting a building such as he saw would be. The objection is overruled.

Mr. Finlen: I wish to add to the objection he has not [97] shown himself qualified for the reason he states he does not know the size of the building.

The Court: He stated he saw the building at that time and he knew the size and that time he knew the building. The objection is overruled.

Mr. Finlen: Exception.

A. Now do I give the price?

Q. (Question repeated.) A. Yes, sir.

Q. How much? A. \$2633.00.

(Testimony of C. L. Kaudy.)

Q. \$2633.00? A. \$2633.00, that's right.

Q. And if you were to construct that or replace that building today what would it cost, Mr. Kaudy?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; the cost of erecting or constructing the building today is not the test of value.

The Court: Overruled.

Mr. Dwyer: Exception.

A. \$3700.00 would be a moderate price.

Q. Have you examined that building in the last few days?

A. No, I haven't, Earle; it's been about thirty days since I been there.

Q. At that time what was the condition of the garage building?

A. Well, it was in very bad condition. Out of line in every way.

Q. What was the condition of the foundation?

A. Very bad. It was all broken up and there would be no way of repairing the foundation in any way. It would have to be torn out of there.

Q. Was it possible to repair the garage?

A. No, not the garage; no.

Q. Would you give us an estimate of the salvage that could be obtained from the garage at this time, if any?

A. I don't think it would be any. I would say none.

Q. Now with reference to the front building, the six-room house with the bathroom. What would

(Testimony of C. L. Kaudy.)

be the original construction price of that so far as you could estimate that?

A. I believe I have that somewhere in the figure.

Mr. Dwyer: Just a minute. We ask the statement be stricken from the record.

The Court: It will be stricken.

Mr. Dwyer: We object to the question as incompetent, irrelevant and immaterial; no time being shown when the original construction took place or that this witness is qualified to give an estimate of what it would cost to construct this building originally.

The Court: It appearing to the Court from the testimony that the plaintiff purchased the lot and building in 1910 it is the opinion of the Court that the construction cost of the building that was constructed prior to 1910 is too remote to shed any light on the issues here, and for that reason the objection is sustained.

Q. Mr. Kaudy, have you from your knowledge of a building contractor in Butte sufficient data at your command to estimate the cost—if necessary to replace it what would [99] it cost today to build a building identical with the Poague dwelling as you last examined it within the last thirty days?

Mr. Dwyer: Objected to on the ground and for the reason the question involves three or more different questions; it's incompetent, irrelevant and immaterial. The witness has not shown himself qualified to answer this question, and it asks for a

(Testimony of C. L. Kaudy.)

conclusion as to whether or not he has data sufficient for certain purposes.

The Court: I will sustain the objection. It's a compound question and several answers would be required.

Q. Mr. Kaudy, have you made an examination of the Poague dwelling? A. I have.

Q. Do you know of its construction and the materials of which it was constructed?

A. Yes.

Q. When you last saw it what was its condition so far as you can describe it?

A. Its condition was in very, very bad shape. The bricks were giving away, cracking away, and the wall was letting down and the inside of the house is breaking in different places.

Q. From your observation in your opinion was that house and is that house susceptible of being repaired at this time? A. It is not.

Q. Why not?

A. It is too far gone; too far out of shape. You would have to take the building down in order to do anything with [100] it.

Q. If you had the labor and materials here in Butte at this time could you replace a building such as the Poague residence? A. I could not.

Q. I mean could you build a building of that kind?

A. You mean could it be done for any certain price?

The Court: He is asking you whether you could

(Testimony of C. L. Kaudy.)

build a house in Butte if you had labor and materials?

A. Yes, sir.

Q. (By Mr. Genzberger): What would it cost today to build a house of the character and dimensions and the material of the Poague residence?

Mr. Dwyer: We object to it as incompetent, irrelevant and immaterial; not the test of value in this case the test being the reasonable market value of the building at the that injury, if any, occurred to it; and the witness has affirmatively shown himself to be disqualified or not qualified with respect to the cost of this building because he does not know the dimensions and that is an essential part, essential record determining what the building would cost.

Mr. Genzberger: Before the Court rules I would like to ask another question.

Q. Did you make measurements of the building at any time?

The Court: Just a minute. Will you read the question back. (Reporter reads question). Well, I am a little uncertain what is meant by material. Do you mean a brick veneer building? [101]

Mr. Genzberger: Brick veneer and rubble stone foundation and composition roof, and the same plumbing that is now in the Poague dwelling.

The Court: Your objection goes to this question I assume, Judge Dwyer.

Mr. Dwyer: We renew the objection to the addi-

(Testimony of C. L. Kaudy.)

tion of the question or the amendment to the question.

The Court: Very well, the objection will be overruled. Do you have the question in mind?

A. No, I don't know as I do. I just have the price of the new building in mind.

The Court: Maybe you better put the question to him again Mr. Genzberger.

Q. Did you any time?

The Court: Put the question to him what it would cost to build that building.

Q. What would it cost to replace the Poague building today with like materials and like dimensions?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial, and not the proper test of value and no proof of the value of the building or proof of any issue in this case.

The Court: Overruled, answer the question.

A. That would be \$8150.00. That is the six-room dwelling with bath.

Q. That would not include the cost of reconstructing the garage?

A. The garage is independent from that.

Q. From your examination of the Poague dwelling what would you say was the salvage value of the materials now [102] in the property?

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial; no proof of any issue in this case; no question to salvage value. The ques-

(Testimony of C. L. Kaudy.)

tion is as to the difference in value now and the value before the injury.

Q. I will withdraw the question. What is the value of the Ella Poague property as it stands today, Mr. Kaudy?

A. Including the garage or the property?

Q. The whole property as it stands today, what is its worth now in the present condition?

A. Well, I wouldn't place any value on it at all.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: No, I think the testimony of the witness said something is of no value.

Mr. Dwyer: He was asked specifically what the value was and he said no value.

The Court: Objection overruled.

Q. Do you mean it has no value today when you say you wouldn't place a value?

A. I don't see any value; I wouldn't place value.

Q. How much is it worth?

The Court: I think he answered the question. Proceed.

A. I would say no value.

Q. You say it's of no value. Would you as a contractor today take a contract to raze those two buildings and pay Ella Poague anything for the salvage material? A. I would not.

Mr. Dwyer: Objected to as incompetent, irrelevant and [103] immaterial; what he would do is no evidence as to value of these buildings.

The Court: The objection is overruled. As I

(Testimony of C. L. Kaudy.)

view it it is not a question that attempts to elicit testimony from the witness as to any particular value of the building. Secondly, if it is the witness was permitted to testify as to his opinion as to the value of the property which included the buildings without objection and it is therefore harmless. The objection is overruled.

Mr. Dwyer: Exception.

Q. What would be the reasonable cost in the City of Butte today of razing the buildings on the lot that we were referring to at 415 South Dakota and refilling the excavation where the buildings had been?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Dwyer: Exception.

A. \$8150.00 as my figure before.

Q. No. How much would it cost to tear down and haul away the wreckage and fill up the holes?

A. I would say \$1000.00.

Q. If the Poague building in its present location were not cracked and injured as you found it what would you estimate the probable life of that building from now on, a building of that like character and construction and sitting on solid ground?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; the witness hasn't shown himself qualified to answer this question; he hasn't shown he knows how old the [104] building is to answer that question.

(Testimony of C. L. Kaudy.)

The Court: I think I will sustain that objection.

Q. Assuming, Mr. Kaudy, that there was an original old building of brick veneer construction existing on that property in 1910; assuming further that certain renovations and improvements were made on that building from time to time consisting of at present a composition roof and new porch within the past six years or ten years, between the last six and ten years; with a new bathroom added about 1917 and a back porch built about 1925, what would you say should be the life such a building of brick veneer construction if built on solid ground?

Mr. Dwyer: I object to the question as assuming facts which are not in evidence and assuming a knowledge of cost of construction of certain improvements which are not given, no evidence given of this; that the hypothetical question presents facts insufficient for any person to determine the life or the possible life of this building. Further that the hypothetical question is insufficient in that it does not give the age of the building or the character of cost, nature or material used in any of the improvements.

The Court: Well unquestionably the hypothetical question is insufficient because it does not give age of the building and there is nothing in the evidence in which the hypothetical question could be predicated upon which the age of the building could be given, so the objection is sustained.

(Testimony of C. L. Kaudy.)

Cross-Examination

By Mr. Finlen: [105]

Q. You state, Mr. Kaudy, you do not know the size of either of these buildings?

A. Well, I have had them measured up, Mr. Finlen, but I just do not happen to have it with me. I don't know the size to the inch but I could guess it. I have the size but not right here at this present moment.

Q. Of what is the garage constructed?

A. It's brick; brick construction with cement walls and cement floor down in the basement; and where the cars roll in at the second floor that's wood construction of two by tens.

Q. The cost or the value of that building then depends upon, among other things upon the number of bricks in the building?

A. I don't believe I understand clearly.

Q. Would not the cost of the building depend upon the number of bricks, among other things, placed in the building?

A. Well, yes, I believe it would all right.

Q. Have you any doubt about that?

A. No, I have no doubt about it.

Q. Would it depend upon the quantity, among other things, of the cement used?

A. I am quite hard of hearing this afternoon. I just came out of where they were welding and my ears are deaf. Will you speak louder.

Q. Would the cost of the building, among other

(Testimony of C. L. Kaudy.)

things, depend upon the quantity of the cement used in the building? A. Yes, I would say so.

Q. Would it depend, among other things, upon the quantity of wood used in the building?

A. Yes, it would all have a bearing on those lines.

Q. It would all have a very important bearing wouldn't it?

A. Yes, the heavier the construction is the longer life the building would be. If it wasn't for the interruption of any ground, any kind of ground movement or anything like that. It was a very well constructed building.

Q. In determining the cost of any building don't you take as a basis the number of cubic feet in the building? A. You do.

Q. And you don't know the size of either of these buildings?

A. I can't recollect it at this moment.

The Court: He said he did measure them and had the sizes that time but he doesn't have a memorandum here with him.

Mr. Finlen: He testified right now as to value. I want to find out how he got that value right now if he doesn't know the size.

The Court: He did know the size and measured that. That's his testimony. He did that and done that recently. The witness hasn't testified he never knew the size of the building or never measured the building.

Q. How far approximately, Mr. Kaudy, from the front fence is the easterly end of the building.

(Testimony of C. L. Kaudy.)

Directing your attention now to the residence?

A. I believe I have all those in my other memorandum [107] book but I haven't them with me here. Ten feet or twenty feet, I don't know.

Q. How far?

A. I wouldn't say ten feet or twenty feet; I couldn't say.

Q. Do you know how high this residence is?

A. No, I don't believe I could say off hand.

Q. How many excavations are there on the property?

A. I believe one for the garage and one for the house. If that's what you mean.

Q. And where is the sidewalk situated with reference to the property?

A. Down South Dakota street.

Q. Where with reference to the dwelling?

A. Right out in front of the dwelling.

Q. Would that be east of the dwelling?

A. That's east of the dwelling; that's right.

Q. There is no sidewalk about the garage at all is there?

A. It seemed like to me there was along the side of the garage a sidewalk.

Q. I am referring to a concrete sidewalk?

A. Yes, I know what you mean.

Q. Off the property?

A. No, I believe it would be on the property.

Q. But there is no sidewalk for the general public to pass along?

A. No, I don't think so.

Q. The only sidewalk accessible to the general public is east of the property line?

(No answer.)

(Witness excused.) [108]

WADE PLUMMER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name and residence, Mr. Plummer? A. Wade Plummer.

Q. What is your business, or where do you live?

A. 1215 West Gold street, Butte, Montana.

Q. What is your business?

A. Manager of the Butte Water Company.

Q. How long have you been employed by the Butte Water Company?

A. Since September, 1919.

Q. How long have you been the manager?

A. Since November 1st, 1944.

Q. And before that what was your position?

A. Immediately prior to that assistant manager.

Q. And before that were you still employed by the Butte Water Company? A. Yes sir.

Q. In what capacity? A. Superintendent.

Q. And prior to your employment with the Butte Water Company did you have any technical training? A. Yes.

Q. In what kind of work?

A. In civil engineering.

(Testimony of Wade Plummer.)

Q. You have been employed then by the Butte Water Company for many years? [109]

A. Yes, sir.

Q. How many?

A. Nearly twenty-eight years; it will be twenty-eight years in September.

Q. And in what capacities, Mr. Plummer?

A. Various capacities from laborer to manager.

Q. Have you in your present position under your supervision and control the records of the repairs to water pipes, water mains and service lines in the area, in the City of Butte? A. Yes.

Q. And directing your attention to the portion of the City of Butte which is bounded on the south by the south line of Aluminum street, bounded on the north by the north line of Silver street, bounded on the east by the east side line of Main street and bounded on the west by the west side line of Idaho street, have you records showing repairs made to your lines, mains and service lines in that area?

A. We have records showing repairs to mains but being that we do not own the service lines or repair them we have no records about the service lines.

Q. Will you define so the Court and jury will understand what you mean by mains and what you mean by service lines?

A. The main line is a supply line in the street for the consumers. The service line takes off at the main line for each property.

(Testimony of Wade Plummer.)

Q. And the records under your control and supervision show what? [110]

A. The repairs to the main line.

Q. And all repairs made to the service lines are the business of the individual property owner?

A. Yes.

Q. Are the records that you keep of repairs to your water mains made in the ordinary course of business of the Butter Water Company?

A. Yes, sir.

Q. And are they true and correct?

A. Yes, as far as I know.

Q. And how are they made and to whom are they made?

A. Well, the foreman or the man who does the work he makes out a work report on a slip like those?

Q. And what is done with those reports?

A. They are turned in at the shop office.

Q. And they constitute official records of the Butte Water Company? A. Yes, sir.

Q. You were asked to make a search of those records for the repairs made in the area named by me commencing January 19th, 1940, and ending March 20th, 1947?

A. That's what the subpoena says.

Q. That's what the subpoena says was it?

A. Yes, sir.

Q. Did you make such search? A. I did.

(Testimony of Wade Plummer.)

Q. How have you arranged that search, Mr. Plummer, by dates or by streets?

A. By dates.

Q. They are chronological? [111]

A. They are chronological.

Q. Will you tell us in chronological order what your records show relative to repairs made?

Mr. Finlen: Are you asking for the first repair?

Mr. Genzberger: Yes.

Mr. Finlen: Objected to as incompetent, irrelevant and immaterial; upon the further ground it doesn't tend to prove or disprove any issue in the case; upon the further ground its too remote with reference to time; on the further ground it's too remote with reference to place, and on the further ground no proper foundation has been made with reference to cause within the issues of this case.

The Court: Well, as to remoteness the objection is overruled. As to materiality it appears to the Court the Court will not be able to determine whether it is material or not material until the witness has answered the question. As to cause it does not appear at this time whether the evidence will or will not be material. So at this time the objection is overruled with the right granted to the defendant should it thereafter appear that the evidence is neither material or competent or that it has not been connected as to cause to move to strike the testimony of the witness.

Mr. Finlen: To save time may our last objection be considered going to each and every question pro-

(Testimony of Wade Plummer.)

pounded this witness concerning any leak or reported leak.

Mr. Maury: We agree.

The Court: Yes, it is so ordered the ruling of the Court would be the same had the objection been made at [112] the time of giving the specific items of testimony by the witness.

Mr. Finlen: It may be considered the defendant with regard to each ruling be noted an exception.

The Court: Yes, the defendant will be granted an exception to each of the rulings of the Court.

Q. Will you tell us in chronological order what your records show relative to repairs made?

A. January 29th, 1940, on Placer street south of Platinum we had a six-inch joint leaking. Shall I just go right through?

Q. What was done towards repairing it?

A. It doesn't say here what was done but just possibly recaulk with lead.

Mr. Finlen: We object to possibilities on the ground its speculative and conjecture.

The Court: Sustained.

Q. What's the next report after that?

A. February 12th, 1940.

Q. Where was that?

A. Platinum street intersection of Idaho.

Q. What was done there?

A. There was a hole in the ten-inch pipe.

Q. Does it show what caused that?

A. No.

Q. What is the next one?

A. On July 7th, 1940, Porphyry street west of

(Testimony of Wade Plummer.)

Dakota street. Several holes in the six-inch pipe.

Q. What was done at that time at that place?

A. The pipe had the holes in it was taken out and a new [113] piece of pipe put in.

Q. How long was the new piece of pipe?

A. Twenty and one-twelfth feet.

Q. When was the next?

A. September 5th, 1940, on Dakota street north of Porphyry street, a joint was leaking.

Q. What was done to fix that?

A. It doesn't say here. Probably just recaulk with lead.

Mr. Finlen: We object to any testimony as to probabilities.

The Court: Sustained.

Q. Your records show on information as to repair? A. No.

Q. When was the next one?

A. October 4th, 1940, Porphyry street west of Colorado street; six-inch joint leaking.

Q. Does it show what was done with it?

A. No. October 15th, 1940, Placer street north of Aluminum.

Q. What was done there?

A. There was a joint pulled and it shows three feet of six-inch pipe and one six-inch sleeve were used in the repair.

November 12th, 1940, Placer street south of Platinum street, a joint leaking on a six-inch pipe.

Q. When was the next one?

A. December 4th, 1940. Dakota street south

(Testimony of Wade Plummer.)

of Silver street, a joint leaking in the six-inch main line.

Q. Do you know where that location is with reference [114] to the Emma mine shaft?

A. Dakota south of Silver is—the Emma mine shaft, is it between Silver and Mercury?

Silver and Porphyry I think.

A. South of Silver. This would be right directly west then wouldn't it?

Q. Dakota street is the street adjoining the Emma mine on the west? A. I think so, yes.

Q. Do you know what block that is in Dakota street with reference to numbers?

A. Probably the 300 block.

Q. And what repair was made?

A. It doesn't have any listed here.

Q. What is the next?

A. December 5th, 1940.

Q. Where was that?

A. Dakota street north of Porphyry, a six-inch joint leaking; joint of the six-inch pipe leaking.

Q. That's in the same block is it not as the previous one? A. Yes, sir.

Q. Do you know where these two repairs are with reference to 415 South Dakota street?

A. No, sir, I do not.

Q. Assuming 415 is south of Porphyry and north of Gold, where would that be?

A. All three in the same block.

Q. Would be in the block above. You said it was north of Porphyry? [115]

(Testimony of Wade Plummer.)

A. This is north of Porphyry and the last one is south of Silver.

Q. Those are both in the same block?

A. Yes.

Q. Which is one block above the property at 415 South Dakota?

A. This would be the 300 block.

Q. What size main have you running north and south on Dakota street? A. Six inch main.

Q. What size main have you on Porphyry street?

A. Six inch between—I am not sure—between Dakota and Montana.

Q. Then after December 5th, 1940, where is your next call?

A. December 27th, 1940, Dakota street north of Porphyry. A joint in the six inch main leaking.

Q. Do you know how far north of Porphyry?

A. No.

Q. Do you know where the 27th injury occurred with reference to the December 25th injury?

A. No, sir.

Q. They both show the same annotation, north of Porphyry? A. That's all.

Q. All right, what's the next one?

A. That's all in 1940.

Q. What's the next one?

A. January 15th, 1941; Dakota street north of Aluminum. One joint of six inch main leaking. No notation on the [116] repairs.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. January 16th, 1941, Dakota street north of Aluminum.

Q. Is that the same one or a different one from the one preceding?

A. That's a different one. This notes three joints leaking.

Q. Three joints leaking? A. Yes, sir.

Q. That is the 600 block on Dakota street, is it not?

A. I think it is. Below Platinum is generally the 600.

Q. That's two blocks below 415 South Dakota on the same street?

A. Yes, sir; it would be that.

Q. All right.

A. January 25th, 1941, Placer street north of Aluminum. A joint in six inch pipe leaking, six inch main. January 30th, 1941, Dakota street north of Porphyry, two joints telescoped, six inch pipe. Five feet of six inch pipe was used in the repair.

Q. How much?

A. Five feet of six inch pipe.

Q. When and where is the next one?

A. February 1st, 1941, Porphyry street east of Dakota; a joint leaking on six inch pipe.

February 2nd, 1941, Porphyry street west of Colorado, a joint leaking on a six inch pipe.

Q. The one on February 1st and February 2nd occurred at different ends of the same block then, did they not?

A. They were in the same block. [117]

(Testimony of Wade Plummer.)

Q. And that is the street next north of 415 South Dakota, is it not, Porphyry street?

A. Would Porphyry be the 400 block?

Q. Porphyry starts the 400 block; Porphyry to Gold is the 400 block?

A. I am not sure about that; it could be. Porphyry to Gold would be the 400.

Q. And this is the beginning of the 400 block these two repairs took place?

A. They are on Porphyry street.

Q. And Porphyry street starts the 400 block on Dakota street? A. Yes.

Q. When and where is the next place?

A. Which was the last one?

Q. February 2nd. A. February 3rd, 1941.

Q. Those joints were telescoped or pulled?

A. Those were just joints leaking.

Q. After February 2nd?

A. February 3rd, two joints on the six inch pipe were pulled.

Q. Where was this?

A. Placer street south of Platinum. Three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When and where was the next one?

A. February 15th, 1941, Dakota street north of Gold; a hole in the six inch pipe.

Q. You say a hole. How was the repair made?

A. It doesn't state here, but the hole in the pipe is [118] fixed with a leak clamp.

(Testimony of Wade Plummer.)

Q. When and *were* was the next repair?

A. Dakota street north of Platinum.

Q. What date?

A. March 22nd, 1941; one joint pulled. Seven feet of six inch pipe was used in the repair.

Q. When was the next one?

A. Montana street south of Platinum street; joint in six inch vein leaking.

Q. What date? A. March 28th, 1941.

Q. When is the next one?

A. April 29th, 1941, Montana street south of Gold; joint leaking in six inch main line.

Q. When is next one?

A. June 10th, 1941, Colorado street north of Gold.

Q. That's the 400 block on Colorado street?

A. I think it is.

Q. That's one block east of Dakota street?

A. Yes.

Q. What did you find there?

A. A six inch joint leaking on hydrant "T."

Q. When is the next one?

A. July 5th, 1941.

Q. Where?

A. Three quarter line in rear of 101-105, 109 West Porphyry street. Three holes in the three quarter inch line.

Q. What was done there?

A. It doesn't state. That's a service line anyway, [119] three quarters.

Q. When was the next?

(Testimony of Wade Plummer.)

A. July 29th, 1941, Montana street south of Gold street, one six inch joint pulled. Two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. What is a sleeve, Mr. Plummer?

A. It's a cast iron collar we use as a union to join the two ends of the pipe together.

Q. Permits expansion more than a lead joint?

A. It is a lead joint.

Q. And permits expansion of the pipe?

A. Permits expansion?

Q. Movement?

A. There is always movement to the water pipe underground. It permits a certain amount of movement.

Q. When is the next one?

A. August 23rd, 1941, Dakota street south of Porphyry street; a six inch joint telescoped.

Q. How far south of Porphyry. Anything there to show that? A. No.

Q. That's in the 400 block on Dakota street isn't it? A. Yes.

Q. What was done there?

A. Three feet of six inch pipe and one six inch sleeve used. It says six inch valve with joint. Valve, joint must have been telescoped in valve; used a six inch valve and returned a six inch valve.

Q. When is the next one?

A. August 26th, 1941, Dakota street north of Porphyry; [120] three joints leaking.

(Testimony of Wade Plummer.)

Q. That's north of Porphyry again?

A. Yes, sir.

Q. And this time you have three joints leaking?

A. Three joints leaking; yes sir.

Q. What was done?

A. It doesn't state here on the slip.

Q. When was the next one?

A. September 11th, 1941, Montana street north of Platinum; six inch joint pulled; two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next?

A. October 10th, 1941, Dakota street north of Platinum street; six inch joint had pulled; two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next one?

A. October 13th, 1941, Dakota street north of Porphyry; joint leaking on the six inch main.

Q. Does it say what they did? A. No.

Q. What is the next one?

A. October 14th, 1941.

Q. The following day?

A. Colorado street, south line of intersection of Aluminum street; joint pulled. It says cut out here and doesn't list any repairs, any material repairs.

Q. When is the next one?

A. October 26th, 1941.

Q. Where?

A. Colorado street north of Mercury street. A hole in the six inch pipe. [121]

(Testimony of Wade Plummer.)

Q. That's north of the limits we asked for. North of Mercury you said?

A. Yes, that's out of the limit.

Mr. Genzberger: That may be stricken then.

Mr. Finlen: Colorado north of Mercury.

Mr. Genzberger: Yes.

A. November 1st, 1941, Placer Street north of Aluminum street; one joint leaking in six inch pipe. Next is November 2nd, 1941, Colorado street south of Platinum street; one joint pulled; three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next?

A. November 20th, 1941, Placer street north of Aluminum street; one joint pulled; no repairs.

Q. You mean no repairs or no material?

A. No material used on repairs. It was repaired all-right. November 28th, 1941, Platinum west of Montana, a ten inch, joint on the ten inch main line pulled; two feet of ten inch pipe and one ten inch sleeve were used in the repairs.

Q. When is the next?

A. December 13th, 1941, Montana street south of Platinum street; one joint on the six inch main pulled. Two feet of six inch pipe and one six inch sleeve were used in repair.

Q. When and where is the next?

A. December 19th, 1941, Placer street north of Aluminum. One six inch joint pulled; two feet of six inch pipe and one six inch sleeve were used for repairs.

(Testimony of Wade Plummer.)

Q. When and where is the next? [122]

A. December 26th, 1941, Montana street south of Platinum street; one six inch joint pulled; three feet of six inch pipe and one six inch sleeve were used to repair.

Q. That finishes the year 1941?

A. Yes, sir.

Q. Now when and where was the next repair or the first repair in that area in 1942?

A. January 28th, 1942, Placer street south of Platinum; a six inch joint leaking.

Q. When was the next one?

A. February 18th, 1942, Dakota street north of Porphyry; four joints leaking.

Q. That's the same block on which you made a number of previous repairs, the 300 block on Dakota street?

A. No material used on the repairs.

Q. What was done there for those four joints?

A. Probably just caulk and lead.

Q. When and where was the next?

A. March 4th, 1942, Dakota street north of Platinum street; a hole in the six inch pipe.

Q. Where is the next?

A. March 4th, 1942, Dakota street north of Platinum; one joint leaking in the six inch main line.

Q. Have you any information to show how far the last two repairs were apart?

A. No. Here is one here, Dakota south of Platinum.

(Testimony of Wade Plummer.)

Q. The one south of Platinum and the other north of Platinum. I had both from north of Platinum?

A. Dakota north of Platinum and Dakota north of Platinum, both of them. [123]

Q. What is that?

A. This is a hole in the six inch pipe. It was right at the intersection of the north property line on Platinum street right in line with the diagram in the back.

Q. Where was the second one on March 4th?

A. It isn't designated here.

Q. It just says north of Platinum?

A. That's all.

Q. Let's go to the next one?

A. Montana street south of Platinum; six inch joint pulled. That was March 5th, 1942.

Q. March 5th?

A. Yes, sir; two feet of six inch pipe and one six inch sleeve were used.

Q. And when is the next one?

A. March 10th, 1942, Porphyry street and Colorado. That must be the intersection. Two joints on a six inch valve were leaking.

Q. When was the next?

A. May 1st, 1942; one joint leaking on six inch line.

Q. Where?

A. Montana street south of Platinum.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. May 10th, 1942, Montana street south of Silver; six inch joint leaking.

Q. Can you tell how far south of Silver?

A. Eighty-nine feet south of the south property line of Silver.

Q. When and where is the next one?

A. June 12th, 1942, Dakota street north of Platinum [124] street; one joint pulled.

Q. Did you say north or south of Platinum?

A. North of Platinum; three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When and where is the next one?

A. June 15th, 1942, Montana street south of Platinum street; one joint pulled.

Q. When and where is the next one?

A. June 19th, 1942, Platinum west of Montana street; a hole in the ten inch pipe.

Q. When and where is the next one?

A. June 23rd, 1942, Colorado and Porphyry street; the south valve.

Q. Where was that with reference to the Garfield school building?

A. I don't recall just where it was in reference. The Garfield school faced on Colorado street.

Q. The Garfield school was it not on the southeast corner of the intersection of Porphyry and Colorado streets?

A. I can't recall the east and west streets right now.

(Testimony of Wade Plummer.)

A. There was a six inch joint leaking near the valve.

Q. What did you have to do with it?

A. Caulked with lead I imagine. It didn't say anything.

Mr. Finlen: We ask it be stricken.

Mr. Genzberger: No objection.

The Court: Granted. [127]

Q. Where is the next?

A. September 24th, 1942, Montana street north of Platinum.

Q. What was that?

A. One six inch joint had pulled.

Q. When is the next one?

A. September 1st, 1942, Main street north of Aluminum.

Q. What happened over there?

A. One six inch joint pulled.

Q. Where is the next one and when?

A. October 4th, 1942, on Silver street line intersection of Main street; six inch joint leaking.

Q. What was done there?

A. It doesn't state.

Q. When is the next?

A. October 6th, 1942.

Q. Where was it?

A. Tapping clamp for 671 South Main street; the tapping clamp was leaking.

Q. When is the next one?

A. October 7th, 1942, Montana street south of Silver; six inch joint pulled.

Q. How far south of Silver?

(Testimony of Wade Plummer.)

A. Eighty-six feet south of the south property line of Silver.

Q. When was the next one?

A. October 20th, 1942, Montana street north of Silver street; three joints leaking in the ten inch main.

Q. When is the next one?

A. November 5th, 1942, Dakota street north of Aluminum. [128] Six inch joint pulled.

Q. When and where is the next one?

A. December 3rd, 1942; Idaho street north of Porphyry. One six inch joint pulled.

Q. What's the next date you have?

A. 1943 now.

Q. That finishes 1942?

A. Yes, sir. 1-16-43, Dakota street south of Platinum. One six inch joint pulled.

Q. When is the next one?

A. February 3rd, 1943, Placer street south of Platinum street; one six inch joint pulled.

Q. Another six inch joint? A. Yes, sir.

Q. When is the next one?

A. March 17th, 1943, Dakota street north of Platinum street; one six inch joint pulled.

Q. When is the next one?

A. March 24th, 1943, Porphyry street west of Colorado; one six inch joint leaking.

Q. What was done there?

A. The joint was cut out and three feet of six inch pipe and one six inch sleeve were used in the repair. 4-12-43, Porphyry line intersection of

(Testimony of Wade Plummer.)

Dakota; joint leaking on north side of the valve.

Q. What was done?

A. It doesn't state here what was done.

Q. When and where is the next one?

A. 5-8-43.

Q. May 8th? [129]

A. Yes, it would be May 8th; it says 5-8 here.

Dakota street south of Mercury street; joint leaking on the six inch main line.

Q. Where is the next one?

A. May 9th; 5-9-43. Main street intersection of Porphyry street. Two 8 inch joints leaking.

Q. And where is Main and Porphyry with reference to Dakota street and Porphyry street?

A. Main street would be two blocks east.

Q. And where is the next after May 9th, 1943?

A. May 26th, 1943.

Q. Where is that?

A. Dakota street north of Porphyry.

Q. What did you find there?

A. Two six inch joints leaking.

Q. And how far south or how far north of Porphyry? A. It doesn't state.

Q. Does it state anything with reference to the previous reports at that place or that block?

A. No.

Q. All right, when is the next one?

A. June 23rd, 1943, Placer street north of Aluminum. One six inch joint leaking.

Q. When and where is the next?

A. July 10th, 1943.

Q. Where is that?

(Testimony of Wade Plummer.)

A. Dakota street south of Platinum street. Joint leaking on the six inch main.

Q. When and where is the next?

A. July 22nd, 1943, Idaho street north of Silver; one [130] joint pulled.

Q. When and where was the next one?

A. August 12th, 1943. Colorado street north of Platinum street.

Q. North of Platinum? A. Yes, sir.

Q. What did you find there?

A. One six inch joint pulled.

Q. When and where is the next one?

A. August 15th, 1943. Dakota street south of Porphyry street; two six inch joints telescoped.

Q. Can you find where south of Porphyry this occurred?

A. It says right on the valve. It must have been; the valves are on the property line so it must have been on the south property line of Porphyry street and Dakota.

Q. Where is the next?

A. August 20th, 1943.

Q. Where is that?

A. Montana street south of Porphyry street.

Q. What was there?

A. One six inch joint telescoped.

Q. What was done there?

A. That joint was taken out and three feet of six inch pipe and six inch sleeve was used as repairs.

Q. When and where is the next one?

(Testimony of Wade Plummer.)

A. October 28th, 1943, Dakota street north of Porphyry street.

Q. Can you find out how far north?

A. No, it doesn't state here.

Q. What was found there? [131]

A. One joint in the six inch main was leaking.

Q. That joint replaced?

A. No, just recaulked.

Q. What was the next one?

A. November 6th, 1943; Montana street south of Platinum street.

Q. What was there?

A. Found a joint had pulled.

Q. What was the next one?

A. December 24th, 1943; Idaho street south of Platinum street.

Q. What was there?

A. One six inch joint had pulled.

Q. When is the next one?

A. That's the end of 1943.

Q. That winds up 1943? A. That's right.

Q. For the year 1944 what have you?

A. That will be next. January 15th, 1944; Idaho street south of Platinum.

Q. What was that?

A. A six inch joint had pulled.

Q. Can you tell whether or not that was the same joint was pulled on December 24th, 1943?

A. No.

Q. All right, where is the next one?

(Testimony of Wade Plummer.)

A. February 10th, 1944, Porphyry street west of Colorado; six inch joint pulled.

Q. When is the next one?

A. March 1st, 1944; Placer street south of Platinum. [132]

Q. What was that?

A. One six inch joint had pulled.

Q. When and where is the next one?

A. March 4th, 1944, Idaho street north of Platinum street.

Q. What did you find there?

A. A joint on a hydrant "T" leaking.

Q. What is the next one?

A. April 14th, 1944, Main street north of Aluminum street; a hole in a six inch pipe.

Q. Where is the next one?

A. April 28th, 1944, Placer street north of Aluminum street.

Q. What was there?

A. One six inch joint had pulled.

Q. What's the next date?

A. July 30th, 1944.

Q. Where was that?

A. Joint on a south valve at Colorado and Porphyry.

Q. What was done there?

A. It was taken out. The valve was taken out and a new one put in and three feet of six inch pipe and one six inch sleeve were used.

Q. You had no calls in that district between

(Testimony of Wade Plummer.)

April 28th, 1944, and July 30th, 1944? A. No.

Q. When was the next?

A. September 28th, 1944, Main street north of Silver street.

Q. What was found there? [133]

A. An eight inch joint pulled.

Q. When and where were you next called?

A. December 18th, 1944; Montana street north of Porphyry.

Q. What did you find there?

A. A six inch joint had pulled.

Q. That's the lower part of the 300 block on south Montana street is it not?

A. It would be the lower halfway between Porphyry and Silver.

Q. The lower half of the block?

A. Yes, sir. That's all of 1944.

Q. Starting with the year 1945, Mr. Plummer, when was the first service call that you had and where? A. January 17th, 1945.

Q. Where?

A. Montana south of Silver street.

Q. And what was there?

A. Joint pulled; six inch joint.

Q. Can you tell how far south of Silver?

A. One hundred twenty-two feet south of Silver; the south property line of Silver.

Q. When was the next one?

A. January 27th, 1945. Dakota street north of Aluminum street.

Q. What was there?

(Testimony of Wade Plummer.)

A. A six inch joint on the main line pulled.

Q. When was the next one?

A. February 3rd, 1945, Placer north of Aluminum street.

Q. What was there? [134]

A. Six inch joint had pulled.

Q. When was the next?

A. February 9th, 1945, Colorado street south of Gold.

Q. What was there?

A. A joint on six inch main line was leaking.

Q. When and where was the next?

A. February 10th, 1945, Montana street north of Aluminum street.

Q. What happened there?

A. Six inch joint had pulled.

Q. What was done there?

A. That was cut out and three feet of six inch pipe and one six inch sleeve were used as material for repairs.

Q. When and where was the next one?

A. February 17th, 1945, on Dakota street north of Aluminum street.

Q. What happened there?

A. There was a six inch joint had pulled.

Q. Where is the next one?

A. February 24th, 1945, Colorado street south of Platinum street.

Q. What happened there?

A. A six inch joint was leaking.

Q. Montana street north of Aluminum street is

(Testimony of Wade Plummer.)

the 600 block on Montana street is it not?

A. Montana street north of Aluminum. Between Aluminum and Platinum?

Q. Yes. A. I think that's the 600 block.

Q. And Dakota street north of Aluminum is the 600 [135] block? A. I think so.

Q. And Colorado street south of Platinum is likewise the 600 block on Colorado street?

A. I think so.

Q. Where is the next one?

A. March 20th, 1945, Montana street south of Platinum.

Q. That's also the 600 block on Montana street?

A. Yes.

Q. What happened there?

A. Joint pulled on the six inch main line.

Q. When is the next one?

A. March 28th, 1945, Dakota street south of Porphyry.

Q. Can you tell how far south of Porphyry?

A. No.

Q. That is the 400 block on Dakota street is it not? A. I think it is.

Q. What happened there?

A. Six inch joint was leaking.

Q. Did you use any material?

A. No material.

Q. What happened next?

A. March 29th, 1945, Porphyry street west of Idaho street.

(Testimony of Wade Plummer.)

Q. What happened over there?

A. Six inch joint had pulled.

Q. Then what is the next one?

A. April 9th, 1945, Aluminum street east of Montana street.

Q. What happened there? [136]

A. Four holes in the six inch pipe.

Q. When was the next one?

A. April 9th, 1945, Placer street north of Aluminum.

Q. What did you find there?

A. Six inch joint had pulled.

Q. That is the 600 block on Placer street is it not? A. I think it is.

Q. When and where did you go next?

A. April 16th, 1945, Idaho street south of Platinum.

Q. What was there?

A. Six inch joint had pulled.

Q. And that was the 600 block on Idaho street was it not? A. I think it is.

Q. Where next?

A. June 30th, 1945, Porphyry street west of Dakota street.

Q. What happened there?

A. A six inch joint leaking.

Q. Now that's the block in which the new line was put in within the last six years was it not, Mr. Plummer?

A. New water line? We put a new line in there

(Testimony of Wade Plummer.)

recently but I wouldn't state the exact date without looking up our records.

Q. I noticed that Mr. Doran said one of their gas lines had been injured by a power digger of the Water Company. Was that about the time you put in a new line?

A. That's the time we put in the new line.

Q. On June 30th, 1945, we find the six inch joint leaking? [137]

A. That's right.

Q. Where is that with reference to 415 South Dakota, if you know?

A. Galena to Mercury one, Mercury to Silver two, Silver to Porphyry three; that would be north of 415 South Dakota.

Q. Can you estimate the distance?

A. Not knowing exactly where 415 South Dakota is I wouldn't attempt.

Q. Now then, where and when did you go to the next? A. July 27th, 1945.

Q. Where was that?

A. Colorado street south of Gold.

Q. What was there?

A. Six inch joint had pulled?

Q. Then where did you go?

A. August 9th, 1945, to Idaho street north of Gold.

Q. What was found there?

A. Six inch joint had telescoped.

Q. When was the next one?

(Testimony of Wade Plummer.)

A. August 29th, 1945, Platinum street west of Montana street.

Q. What was found there?

A. A joint was leaking on the ten inch main.

Q. You have no way of telling whether that's the same main that was fixed on previous occasions?

A. You mean the same joint?

Q. Yes. A. No, no record of it.

Q. When and where is the next one? [138]

A. August 30th, 1945, Idaho street north of Platinum street.

Q. Where is that with reference to the previous break or leak at Platinum west of Montana?

A. Platinum west of Montana and Idaho north of Platinum. That could be a block apart, or a block and one-half; they are on different main lines.

Q. What?

A. They are on different main lines. The Platinum street line is east and west and the Idaho street line is north and south.

Q. And they are within a block of each other, are they not?

A. They could be within a block or could be two blocks apart; I wouldn't attempt to say.

Q. Platinum west of Montana street would be two blocks apart? A. What was?

Q. The first one was Platinum west of Montana street and the other one Idaho north of Platinum?

A. That could be two blocks.

Q. How could that be?

A. One block west and one block north; a block

(Testimony of Wade Plummer.)

west on Platinum and a block north on Idaho, and it could be any intervening distance.

Q. Up to two blocks?

A. Two blocks would be the maximum distance.

Q. What did you find at Idaho north of Platinum?
A. The joint had telescoped.

Q. When and where were you next called? [139]

A. September 7th, 1945; in front of 626 South Montana street.

Q. What was there?

A. The joint had pulled on the six inch main line.

Q. When and where were you called next?

A. September 9th, 1945, Porphyry line intersection of Idaho street.

Q. What was done there?

A. A hole was found in the six inch pipe.

Q. Then when and where were you called?

A. September 16th, 1945, on Placer street south of Platinum street.

Q. What was there?

A. One joint in six inch main line leaking.

Q. When and where did you go next?

A. October 6th, 1945, Dakota street south of Mercury street.

Q. What did you find there?

A. A six inch joint leaking.

Q. That's the second street above, in the second block above the property at 415 south Dakota, is it not?
A. Yes.

Q. When and where did you go next?

(Testimony of Wade Plummer.)

A. October 9th, 1945, Dakota street south of Porphyry.

Q. South of Porphyry street?

A. Yes, sir.

Q. Can you tell where that is with reference to 415? A. No.

Q. That's in the same block as is 415 South Dakota street, is it not? [140]

A. Yes, it is the same block I think.

Q. You can't tell how far south?

A. No, sir.

Q. What did you find there?

A. Found a six inch joint pulled and one six inch joint had telescoped.

Q. There was two joints then that were injured at that place? A. Yes, sir.

Q. When and where did you next visit this area?

A. November 8th, 1945, Aluminum street east of Montana street.

Q. What did you find there?

A. A hole in the six inch pipe.

Q. When and where did you go next?

A. November 9th, 1945, went to Platinum street lining intersection of Idaho street.

Q. What did you find there?

A. A hole in the ten inch pipe.

Q. A hole would be a break, Mr. Plummer?

A. Well, it would be a hole in the pipe.

Q. A fracture in the pipe?

(Testimony of Wade Plummer.)

A. No, just where electrolysis had eaten a hole in the pipe.

Q. Anything on this ticket to show the cause?

A. No, but the whole theory of corrosion is electrolytic and if you have a hole in the pipe it's corrosion.

The Court: That is from the pipe being in the ground and the water running through it?

A. That's right; it starts a little electric cell of [141] low amperage or low capacity and if it wasn't for electrolysis the pipe wouldn't deteriorate.

Q. That wouldn't have anything to do with the condition of the ground movement?

A. Nothing at all. November 10th, 1945, Platinum street intersection of Idaho street.

Q. (By Mr. Genzberger): What did you find there? A. Ten inch joint was leaking.

Q. You haven't anything to show the relative locations of the visit you made to fix a hole at that intersection on November 9th and this joint pulled on November 10th?

A. No, we had the hole located in which we had the hole in the pipe.

Q. No connection between the two injuries there? A. No connection at all.

Q. Two separate injuries?

A. That's right.

Q. Where is the next one?

A. November 15th, 1945, Platinum street east of Idaho. Hole in the ten inch pipe.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. November 16th, 1945, Dakota street north of Aluminum.

Q. What was there?

A. The six inch joint had pulled.

Q. Where is the next?

A. December 6th, 1945, Colorado street south of Porphyry.

Q. That's the 400 block on Colorado street?

A. Yes, I think it is.

Q. What was there?

A. Two joints at the valve leaking.

Q. Where next?

A. December 8th, 1945, Montana street north of Porphyry.

Q. What did you find there?

A. Six inch point had pulled. That's all for 1945.

Q. Have you the records of 1946? When is the first service call to this area?

A. January 21st, 1946.

Q. Where did you go?

A. Platinum street west of Montana.

Q. What did you find there?

A. A joint on the ten inch pipe leaking.

Q. Did you say broke or leaking?

A. Leaking.

Q. What was done with it?

A. Probably caulked the lead.

Q. When was the next one?

A. January 21st, 1946.

(Testimony of Wade Plummer.)

Q. The same day? A. The same day.

Q. Where was that?

A. On Main street line intersection of Platinum St.

Q. What was there?

A. Six inch joint leaking.

Q. When is the next?

A. February 3rd, 1946, Montana street north of Aluminum. [143]

Q. What happened there?

A. Joint leaking.

A. When was the next one?

A. April 8th, 1946, Placer street north of Aluminum street.

Q. And what happened there?

A. One joint leaking on a six inch main.

Q. When was the next one?

A. March 26th, 1946, Platinum street line intersection of Colorado.

Q. What happened there?

A. There was an eight inch joint leaking.

Q. When was the next one?

A. August 15th, 1946, Platinum street west of Montana street.

Q. What was there?

A. Ten inch joint leaking.

Q. When was the next?

A. Dakota street north of Aluminum; October 9th, 1946.

Q. What did you find there?

A. A six inch joint leaking.

(Testimony of Wade Plummer.)

Q. When was the next one?

A. November 6th, 1946.

Q. Where was that?

A. Montana and Aluminum street.

Q. What was there?

A. The valve was leaking in the packing.

Q. Where did you go next?

A. November 3rd, 1946, to Main and Platinum street; on the Main street line near the south valve.

Q. What happened there?

A. A six inch joint was leaking.

Q. Where did you next go?

A. December 7th, 1946, Idaho street north of Gold.

Q. That's the 400 block on Idaho street?

A. Yes.

Q. What was there?

A. Six inch joint leaking.

Q. That's the end of 1946?

A. That's the end of 1946.

Q. Now you have some 1947's there?

A. Yes, a few. January 8th, 1947, Placer street north of Aluminum.

Q. What did you find there?

A. One six inch joint leaking.

Q. When is the next one?

A. January 9th, 1947, Colorado street south of Platinum.

Q. What was there?

A. Six inch joint leaking.

Q. That's in the same block north and south

(Testimony of Wade Plummer.)

as the previous one, is it not. It's two blocks to the east?

A. Placer north of Aluminum and Colorado south of Platinum.

Q. Both in the 600 block of the respective streets? A. Yes.

Q. Where is the next one?

A. January 25th, 1947, Dakota street north of Aluminum street.

Q. That's in the same block south as the previous two, [145] is it not?

A. It would be in the 600 block.

Q. What did you find there?

A. Six inch joint leaking.

Q. When is the next one?

A. February 6th, 1947, Montana street north of Aluminum.

Q. That's also in the 600 block, is it not, Montana street? A. That's right.

Q. What did you find there?

A. Six inch joint leaking.

Q. When is the next?

A. March 12th, 1947, Dakota street north of Aluminum.

Q. What did you find there?

A. Six inch joint leaking.

Q. That is all of the slips? A. That's all.

Q. Now, Mr. Plummer, tell the jury the method

(Testimony of Wade Plummer.)

of constructing the distribution lines of the Butte Water Company in the area about which you are now testifying as to the north and south lines and the lateral lines and their interconnection, if any?

A. I don't quite get you.

Q. How do the mains of the Butte Water Company run?

A. They run in the streets, general direction north and south streets. I mean the streets are not compassed north and south but general directions east and west and north and south and they are all in the street, generally on the north side and on the west side of the street; [146] and they are connected together at the intersection of the streets similar to a gridiron.

Q. You have mains running north and south on Dakota streets?

A. Yes, sir.

Q. And on Montana street?

A. Yes, sir.

Q. And on Colorado street?

A. Yes, sir.

Q. And at Porphyry street, for example, there are cross lines connecting Montana street main and Dakota street main and Colorado street main?

A. Yes, sir.

Q. Those are all tied in together?

A. They are all connected together.

Q. In this particular area for the most part you had a six inch steel pipe?

A. That is most part, just six inch steel pipe.

(Testimony of Wade Plummer.)

Q. Some places you said ten inch joint?

A. Yes, sir.

Q. That would involve a ten inch line?

A. Yes, sir.

Q. And eight inch joint means an eight inch line at that particular place? A. Yes, sir.

Q. How are these pipes connected one with the other?

A. With a bell and spigot joint with lead caulked in.

Q. Explain the bell and spigot joint so the ladies and gentlemen of the jury will understand it?

A. The bell end is enlarged to permit the insertion [147] of the spigot end and the area between the inside of the bell and outside of the spigot we pour hot lead in that and caulk it and that forces the joint.

Q. When you caulk it that means pouring hot lead between the two pieces of pipe? A. Yes.

Q. The bell end and the spigot end?

A. The spigot end goes into the bell end and leaves an area depending on the size of the pipe how big the area is you pour hot lead in. Which we do, not you.

Q. And the lead forms a binder between the two pipes?

A. It's no good unless you caulk it with a hammer and caulking tool.

Q. After you pour it in, the moulten lead, you hammer it to make the joint tight?

A. Yes, sir.

(Testimony of Wade Plummer.)

Q. What, if anything, does lead caulking have to do with the expansion of the two pipes, the movement, permitting or not permitting movement between the two pipes?

A. It doesn't break the pipe when it moves.

Q. And normally you said a while ago that water pipes move underground?

A. Yes, sir.

Q. What causes their movement?

A. Expansion and contraction.

Q. And in laying water mains do you engineers make provision for that normal movement or expansion and contraction?

A. Well, the bell and spigot joint takes care of it to a certain point, but sooner or later it comes to its [148] elastic limit and the constant movement will cause the joint to leak.

Q. What other causes would there be for movement on water pipes?

Mr. Finlen: We object to this, if the court please, as calling for a conclusion and speculation; and doesn't prove or disprove any issue of this case what might cause pipes to leak.

The Court: Well, he is testifying as an expert and calling for expert testimony and for that reason the objection will be overruled.

Q. (Question repeated.)

A. For movement? Water hammer.

Q. And what is that?

A. That is a surge within the pipe of water and it causes a tremendous pressure under certain conditions.

(Testimony of Wade Plummer.)

Q. That is a normal movement?

A. In the distribution system it is.

Q. That is provided for in the original construction? A. They can't provide for that.

Q. What effect does subsidence of ground have on water pipes in the subsiding ground?

A. It would cause—— (interrupted).

Mr. Finlen: We object to that upon the ground it's speculation; on the ground it's indefinite with reference to the amount of subsidence.

The Court: Overruled.

Q. (Question repeated).

A. Subsiding ground would cause a joint to leak.

Q. And you mentioned several times during the recital [149] of your service calls on repairs on mains that certain joints had pulled. What do you mean by that?

A. That there is an area of—the pipe is under tension. In other words, the pipe had to pull slightly or various degrees out of the joint. I mean one pipe had pulled out of the other.

Q. In some cases you said that the joints had telescoped and in others the valve had telescoped or the joint telescoped into the valve? What do you mean by that?

A. That would be just the opposite, an area of compression in the pipe; the pipe would be under compression.

(Testimony of Wade Plummer.)

Q. What is the effect of a force that puts a pipe under compression? What would you find?

A. What was the effect?

Q. Yes.

A. Well, that would be a telescoping or a buckling.

Q. A telescoping or buckling?

A. Yes, sir.

Q. That would be the spigot joint going too far into the bell joint?

A. That would be a telescoping and might buckle.

Q. Upwards?

A. Or downwards or sideways.

Q. That is due to strain with exceptional force being applied to the pipes in question?

A. It would be quite a force, yes, sir.

Q. And that strain might be up and down on the pipe or along its length or across it, may it not?

A. Well now, wait a minute.

Q. Could you tell? [150]

A. A strain to pull a joint would be lateral and a strain to telescope a joint would also be lateral, but the up and down and crossways force that you spoke of wouldn't tend to telescope or pull a joint.

Q. Would that buckle a pipe?

A. Probably it would put it out of line.

Q. If the pipe was put out of line what happens?

A. That would be various things. It might or might not spring a joint.

Q. When you find that a joint is pulled what

(Testimony of Wade Plummer.)

happens to the water running through the main at the point the joint is pulled?

A. The water still goes through the main. With a lead joint it leaks a very small amount.

Q. If the joint is pulled you wouldn't have a rush of water?

A. Not unless the lead had blown clear out.

Q. If the joint is telescoped what do you find?

A. A small amount of water escaping at the joint.

Q. Then I take it that the pulling or telescoping of a joint will cause a leak if it's of sufficient distance? A. That's right.

Q. How do you account for the exceptional number of leaky joints and telescoped joints in the area about which you have just testified?

Mr. Dwyer: We object to that as assuming a fact not in evidence.

The Court: Sustained.

Q. The number of service calls to which you have testified this afternoon is an exceptional number of calls [151] for that small area of four blocks by four blocks in extent, is it not?

A. I wouldn't attempt to answer that without comparison of other areas, which I haven't done.

Q. These calls you have testified to this afternoon all involve merely injuries to the mains of the Butte Water Company?

A. I wouldn't say injuries entirely.

Q. Abnormalities?

(Testimony of Wade Plummer.)

A. No, they were just water escaping; some of them were injuries.

Q. From the mains of the Butte Water Company?

A. And some of them were just the water escaping; that a joint leaked slightly and no injury to the pipe or the joint.

Q. And they did not include pipe repairs that were necessitated in so-called service lines?

A. No, sir.

Q. Those would not appear on your record?

A. We don't repair them.

Cross-Examination

By Mr. Finlen:

Q. Mr. Plummer, you said subsiding ground would cause a pipe to leak. You mean would cause or could cause? A. Could cause.

Redirect Examination

By Mr. Genzberger:

Q. And if there was a sufficient amount of subsidence or ground movement, Mr. Plummer, the main would always leak, would it not? [152]

A. Not after you fix it once.

Mr. Dwyer: We object to the question answering itself.

The Court: It seems to be obvious to me, yes.

Mr. Genzberger: That is all.

(Witness excused.)

Mr. Genzberger: May it please the Court, when I had Mrs. Poague on the stand this morning I overlooked that attention to the detail of the house, some of the external things I wish her to testify to at this time, and I now ask leave to recall Mrs. Poague for redirect examination.

The Court: You may.

MRS. NELLIE POAGUE,

the plaintiff, who heretofore was sworn and testified, was recalled for further

Redirect Examination

By Mr. Genzberger:

Q. Mrs. Poague, you described to the jury certain abnormal or unusual things that happened inside your house. Did you notice in connection with that any sounds that accompanied the injury to your house? A. Well, yes, sir.

Q. What did you observe?

A. Well, when I would be in any part of the house I would hear an awful bumping like; well, almost like [153] thunder and it would shake the house; and several times the dishes and glasses I have upon the little cupboard in the kitchen would rattle and several glasses have been broken.

Q. Do you know what that noise like thunder was? A. I have thought it was blasting.

Q. Did it sound like blasting?

A. Well, it made an awful noise.

Q. What was the noise?

A. Like thunder.

Q. Well, was it an explosion?

(Testimony of Mrs. Nellie Poague.)

A. Well, of course I couldn't see but I could just hear the awful boom like that. Boom, like that.

Q. That's the way it sounded?

A. Boom, like that.

Q. How many of those booms did you hear at a time?

A. Four or five in quick succession.

Q. And what time of the day or night did you observe it?

A. Well, it usually would happen in the midnight, you know; well, oh, around twelve o'clock and three o'clock in the night.

Q. Between twelve and three? A. Yes.

Q. In the night? A. Sir?

Q. Twelve and three in the night you noticed it most? A. Yes, sir.

Q. How often did you hear that boom, boom?

A. I know I must have heard it over ten or twelve or [154] fifteen or twenty times from time to time.

Q. What, if anything, did you hear about the time of those unusual noises with reference to your house?

A. Well, when the pictures on the wall fell, several of them fell and the dishes on the icebox; I had a tray on my icebox with glasses on it and it slid off; and the stove-pipe fell down.

Q. When was that?

A. This is when I would hear this awful booming like.

(Testimony of Mrs. Nellie Poague.)

Q. How long ago was that?

A. That was in—that's about two years ago; between two years ago and about in, oh, 1945 and 1944; along in there, and 1946.

Q. Did you notice anything in your neighborhood that might account for these large noises you heard?

Mr. Finlen: We object to this line of testimony as injecting a new issue in this case.

The Court: Sustained.

Mr. Finlen: We ask that the testimony relative to the so-called shaking or blasting be stricken as not within the issues.

The Court: I think I will deny that. The motion comes too late. I will sustain the objection. As to the motion to strike it comes too late.

Mr. Genzberger: That's all.

Mr. Finlen: We would ask leave to ask a question or two which I should have asked on cross-examination.

Mr. Maury: No objection.

The Court: Very well. [155]

Recross-Examination

By Mr. Finlen:

Q. Mrs. Poague, in testifying before, you gave the name of a neighbor of yours who, according to you, gave a cash offer for your house?

A. Sir?

Q. You gave the name of the man that offered you so much cash for your house?

(Testimony of Mrs. Nellie Poague.)

A. Yes, sir; a quite a while ago; a good many years ago, I will say.

Q. How many years ago?

A. Well, I think it was——

Q. Approximately? A. Oh, well, 1927.

Q. 1927? A. I think about.

Q. What was his name?

A. Alex Meagher.

Q. Where did he live?

A. He lived next door to me.

Q. To the south or north?

A. To the north; the double brick next to me.

Q. The house situated between your house and the corner? A. Yes, sir.

Q. What happened to Mr. Meagher; where is he, if you know?

A. A lady told me about a couple or three months ago—it may be longer—that he sent to where his son is a doctor; Camay is a doctor, and young Camay Meagher said he had a cancer of the throat and another lady told me later [156] that he died.

Q. So far as you know then he is dead?

A. So far as I know he is dead, and they brought his remains back here to Butte for burial.

Q. That's Camay Meagher's father?

A. And I think John Meagher is working up on the hill with Mr. Carrigan, I know he has worked with Mr. Carrigan in some capacity for quite a while.

Mr. Finlen: That is all.

(Witness excused.)

Mr. Maury: Mr. Finlen, is it agreed that since 1917 the Butte Copper & Zinc Company, the defendant, has been owner of the minerals in the Emma, the Nellie and Czaroma lodes?

Mr. Finlen: It may be so stipulated.

The Court: Let the record so show.

Mr. Maury: And is the paper marked "Anaconda Copper Mining Company, W. D. Thornton and Butte Copper & Zinc Company of date July 17th, 1917, the original lease between the Butte Copper and Zinc Company and Anaconda Copper Mining Company," or have you an authenticated copy?

Mr. Finlen: I could not state as to that.

Mr. Maury: Was that instrument produced upon notice at another trial?

Mr. Finlen: I believe that instrument was produced [157] upon notice at another trial. Whether it was the original agreement——

Mr. Maury: I didn't think it was the original. I stated an authenticated copy.

Mr. Finlen: It might not have been the original agreement. I mean the first.

Mr. Maury: We offer in evidence this Agreement between the Anaconda Copper Mining Company and Butte Copper and Zinc Company of date of July 16th, 1917, for the purpose of showing that there is no provision in the agreement to in any wise protect the surface.

Mr. Finlen: How has the agreement been identified, Mr. Maury?

Mr. Maury: The agreement is identified. I will

have it marked in this case. It's now marked plaintiff's Exhibit No. 8.

Mr. Finlen: To which the defendant objects on the ground and for the reason it's incompetent, irrelevant and immaterial; and does not tend to prove or disprove any issue in this case, and is not evidence of any issue; and it's particularly incompetent for the purpose for which it is offered and also irrelevant and immaterial for that purpose.

Mr. Maury: You say there is an agreement in it for the protection of the surface?

The Court: Just a minute. Ladies and gentlemen of the jury, there is a legal matter presented for my attention and you will step out into the hall and be at ease for a few minutes.

(Jury steps out of courtroom.) [158]

The Court: Let me see the agreement, Mr. Maury. Well, it seems to me that although apparently it was not offered for that purpose and I might have no right to consider it for that purpose it does seem to me that the agreement is material in support of the allegation of the fifth paragraph of the complaint.

I assume the agreement leases those properties to the defendant. Why isn't it material in support of that allegation?

Mr. Genzberger: That's the purpose of it to show——

The Court: The purpose was limited to show a negative, not a positive.

Mr. Maury: It shows a lease and also shows a

legal condition there is no provision in the lease that the surface shall be protected. I don't want to restrict it.

The Court: I understand the offer was limited to that purpose.

Mr. Maury: No, I don't limit it to that purpose. I just said that's one reason it was offered.

Mr. Genzberger: It's offered with the others for the purpose of showing who was in possession and under what terms, of the Emma mine, and why the operations are being conducted and why we feel the defendant in this case was liable for such operations. This is the connecting link.

Mr. Maury: I might say we will proceed to supplement that offer by an extension right up to 1950.

The Court: I had that in mind, Mr. Maury, but I don't see where it—it seems to me the only portion of this agreement that could possibly be of any materiality here [159] would be the form of lease.

Mr. Maury: There might be many immaterial things, but we called for it in the case as one instrument. We didn't know what was in it.

The Court: The entire thing is offered here?

Mr. Maury: We can't pull a document apart that is presented to us on demand.

The Court: That may be very true but the court has no power to permit many documents that have no bearing on the case at all to be introduced in evidence.

Mr. Maury: We are very glad to shorten the record.

Mr. Genzberger: Your Honor suggests we could offer certain portions of this?

The Court: The rule is that only documents be offered that are material to the issues in the case.

Mr. Genzberger: I admit the greater portion is not material.

The Court: I am not talking about the lease. As I view it the document in its essence is not a lease at all. It's a contract; a contract that is entered into between the Anaconda Copper Mining Co., W. D. Thornton and the Butte Copper and Zinc Company. It looks to the purchase by the Zinc Company of the Czaroma and Nellie Quartz Lode Mining Claims. As I understand it that is the essence of this document here. The contract provides that upon the purchase, if and when that is done, the Zinc Company will execute a lease to the Anaconda Copper Mining Company; and it attaches to the document as an exhibit a form of lease that it will execute if they make the purchase and after the deeds of transfers are made. [160]

Mr. Genzberger: I think the material one is the lease of the 24th of June, 1940, after that purchase had been completed, whereas they recite a previous lease they call it where under date of July 6th, 1917, the Zinc Company as lessor entered into lease with the Mining Company. As a matter of fact I believe the only one material at this time except insofar as regards to the previous lease is this third one not yet marked here but the one in effect June 24th, 1940, which will be offered.

The Court: I don't care to see it now.

Mr. Genzberger: It hasn't been offered yet; it's part of this offer. It will be part of this offer. It will certainly shorten the record to put in the latest one and the current one.

The Court: It may be proper to put in the one Mr. Maury desires to put in.

Mr. Maury: Of course it's a very lengthy document and some of it is extraneous, but we can't separate a document that is presented to us on notice.

The Court: As I view it there are many documents in this offer that are complete and whole in themselves and could have been separately demanded and separately granted. For instance, it's recited here as a part of the contract, and there is offered here as a part of your offer, for instance, a copy of agreement dated August 8th, 1916, by and between the Montana Realty Company and W. W. McDowell, Silver Bow County, Montana. That is part of the document and has nothing to do with it. A copy of assignment from W. W. McDowell as party of the first part to John Gillie as party of the second part. [161] That's also a part of it. There is attached as an exhibit to the lease or to the main contract what is denominated as exhibit "G" which is the lease they say they will make and which is the matter that you deem of importance.

Mr. Maury: We deem that all important and will offer a subsequent document showing that it had been made effective between the parties. Whatever the conditions were about its being fulfilled

they had been fulfilled at a certain time. In October, 1927, they had been fulfilled and then again in June, 1933, and then again in June, 1940; and they all go back to an agreement of 1917, or extend and relate to it. If we can separate that we will certainly be glad to do it to shorten the record.

The Court: The objection as made to the exhibit as offered is sustained upon the express ground that such of it is immaterial to the issue and would be an encumbrance upon the record.

This ruling without prejudice to the plaintiff to offer as an exhibit in the case a lease referred to as Exhibit "G" in the document as offered and purporting to be between the Butte Copper and Zinc Company, a corporation, and the Anaconda Copper Mining Company, a corporation, as of the 6th day of July, 1917, if such lease was actually ever consummated and came into existence.

I think that probably much time could have been saved in the trial of the case if I had of taken due advantage of the authority that I have to hold pre-trial conferences to determine whether there would or would not be any serious question raised as to whether there was or [162] was not a lease existing between the Anaconda Copper Mining Company and Butte Copper and Zinc Company and whether if it was the lease did or did not contain certain provisions. As I view it that should not be any matter of real legitimate dispute.

It's too late for me to do anything about it now but if that question is going to be presented in

other cases I intend in the trial of the other cases to hold pre-trial conferences and thrash that out.

Call in the Jury, Mr. Bailiff.

(Jury returns to the courtroom.)

(Whereupon, an adjournment was taken until Wednesday, April 2nd, 1947, at 10:00 o'clock a.m., when the trial of the case resumed as follows, to-wit:)

The Court: Proceed with the trial, gentlemen.

Mr. Maury: If your Honor please, we offer in evidence a certain part of a record that has been presented to us by the defendant's counsel as being an authentic copy of a lease between the Butte Copper and Zinc Company and the Anaconda Copper Mining Company of date July 6th, 1917. The object is not numbered in this.

The Court: Have Mr. Walker mark it, Mr. Maury.

Mr. Maury: The first page is not numbered. The next page commencing is No. 2 but it can't be number two in this bunch of papers.

The Clerk: It is marked Exhibit No. 8-A.

Mr. Finlen: To which the defendant objects on the ground and for the reason it does not tend to prove or disprove any issues in this case and is wholly without the issues as framed by the pleadings.

The Court: The objection will be overruled, and I [163] think, Mr. Walker, you have marked the Exhibit on the first page No. 8-A.

Mr. Maury: It's not on the first page; it's many pages.

The Court: You marked on the first page of the lease 8-A.

The Clerk: Yes, sir.

The Court: I think on the last page you better mark 8-B so as to show where the exhibit commences and where it ends.

Mr. Maury: It proceeds from 8-A and thereafter the pages are numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

The Court: I think that's a sufficient identity of the instrument.

(Plaintiff's Exhibit 8-A Lease contained in Exhibit No. 8, pages 1 to 13 inclusive, dated July 6, 1917, was here admitted in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

[Plaintiff's Exhibit No. 8-A set out on pages 371 to 382.]

Mr. Finlen: My understanding is merely the pages designated are offered and not the entire instrument?

The Court: I understand the pages designated constitute the entire lease. That is true. Mr. Maury?

Mr. Finlen: Constitute the entire lease. That's true yes but he is not offering everything bound together here.

The Court: No. My purpose was to identify the entire lease; that the pages if they were taken from the instrument they would be loose and I want to identify the entire lease. That was my purpose.

Mr. Maury: We now offer in evidence what purports to be an extension of No. 8-A an instrument

of date October [164] 17th, 1927, between the Butte Copper and Zinc Company and Anaconda Copper Mining Company. The same has been presented to me at another time by counsel here as an authentic copy of the original instrument which was called for.

The Court: Any objection to the offer?

Mr. Finlen: Defendant objects to the introduction or the reception in evidence of what has been marked for identification Plaintiff's Exhibit No. 9 on the ground and for the reason that it does not prove or tend to prove or disprove any issues in the case. On the further ground it is fully without the issues as tendered by the pleadings.

The Court: The objection will be overruled and the exhibit will be admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 9 was here offered and received in evidence, the same being an extension of lease Exhibit 8-A dated October 17, 1927, and the same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 9 set out on pages 382 to 386.]

Mr. Maury: We offer in evidence instrument dated June 1st, 1933, between Butte Copper and Zinc Company and Anaconda Copper Mining Company purporting to be a further extension of 8-A. This is the document which was given to me in response to a call in another case and it being an authentic copy of an original which the counsel said was in New York.

Mr. Finlen: Defendant objects to the reception of what has been marked Plaintiff's Exhibit No. 10 on the ground and for the reasons stated in the objection to defendant's Exhibit No. 9; to Plaintiff's Exhibit No. 9.

The Court: The objection will be overruled and the exhibit received in evidence. [165]

(Plaintiff's Exhibit No. 10, further extension of lease, Exhibit 8-A, dated June 1, 1933, was here offered and received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 10 set out on pages 386 to 394.]

Mr. Maury: We offer an instrument of date June 24th, 1940, between Butte Copper and Zinc Company and Anaconda Copper Mining Company from page 1 to page 15 inclusive. This is a paper which was handed to me by counsel for the defendant in response to a notice to produce and it was represented to be and doubtless is an authenticated copy. I wish page 16 added to that. That is an acknowledgement. An authenticated copy of a document which was called for in another suit.

The Court: What is it, a further extension of the lease?

Mr. Maury: Yes, sir, an extension of the lease to 1950.

The Court: Very well, have it marked by the Clerk.

Mr. Finlen: The defendant objects to the offer

and to the reception in evidence of what has been marked Plaintiff's Exhibit No. 11 upon the grounds and for the reasons stated in its objection to the reception of Plaintiff's Exhibit No. 9.

The Court: The objection will be overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 11, a copy of further extension of lease, Exhibit 9-A, pages 1 to 16 inclusive, dated June 24th, 1940, was here received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 11 set out on pages 394 to 413.]

Mr. Maury: I know of no way to prove the negative of those documents except by reading them.

Mr. Finlen: May the record show we have an exception [166] to the ruling of the court.

The Court: Yes, the defendant is granted an exception in each instance in admitting the exhibits from 8-A to No. 11 inclusive in evidence.

Mr. Maury: I state I know of no way. It's a very tedious proceeding but I know of no way to prove to the jury the negative without reading them.

Mr. Dwyer: We object to the remarks of counsel made in the presence of the jury. He has offered his exhibits and they have been accepted.

The Court: The objection will be overruled. I don't think it is necessary to read each of the exhibits, Mr. Maury. I think a statement from you that none of the exhibits contains the matter that you have referred to should be sufficient. If there

is any question about it counsel for the defense will be permitted to read the exhibit or any portion of it that they contend is material.

Mr. Finlen: If counsel will state what it is he contends the agreement does not contain we will agree to that.

The Court: I think his contention in that regard is that the agreement contains no provision that the Anaconda Copper Mining Co. would protect the surface of the ground in its mining operations. Is that your contention?

Mr. Maury: That's my contention just in the language of the complaint.

Mr. Finlen: The defendant contends the lack of such provision is incompetent, irrelevant and immaterial; it admits that the agreement does not contain any such statement. [167]

Mr. Maury: Thank you very much. It saves a great deal of annoying reading.

Mr. Finlen: The agreement does contain a provision that the work will be done in a minerlike fashion. It might be argued that means the substance of what counsel has.

The Court: I think that probably would be a question but that will be a matter of argument. Proceed, gentlemen.

Mr. Genzberger: We will call Mr. Bolever.

EDWARD BOLEVER

called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name?

A. Edward Bolever.

Q. Where do you live?

A. 2510 Floral Boulevard, Butte.

Q. What is your business or occupation?

A. Real estate.

Q. Where have you followed that business?

A. About thirty-five years.

Q. Where?

A. The 200 block west Park street. [168]

Q. Now I will ask you for how long?

A. For about thirty-five years.

Q. Have you during the course of your experience had occasion to buy and sell real estate in the City of Butte? A. Yes, sir.

Q. And included in that real estate were there dwelling houses, business properties and even vacant lots? A. Both; all three.

Q. You have bought and sold them as agent for others as well as for yourself? A. Yes, sir.

Q. Have you had occasion to examine the residence of Ella Poague at 415 South Dakota street in Butte? A. I have.

Q. Are you familiar with the surroundings and the nature of the building and the size?

A. Yes, sir.

(Testimony of Edward Bolever.)

Q. And the lots, etc.? A. Yes, sir.

Q. How far is that property from the business section of Butte?

A. Well, I would judge about in the fourth block.

Q. The fourth block? A. Yes, sir.

Q. From the main business street of Butte?

A. From Park street.

Q. And does the location enter into the value of real estate in the City of Butte?

A. It does on account of it being close to the City center. [169]

Q. What in your opinion would be the reasonable value, the reasonable market value of Ella Poague's property if it were not for the elements of underground mining or of neighborhood damage in the neighborhood of the Ella Poague property?

Mr. Dwyer: Objected to on the ground and for the reason the witness has not shown himself qualified or familiar with the elements of underground mining.

The Court: Sustained.

Q. Do you know the locality and are you familiar with the locality in which Ella Poague's property was situated? A. Yes, sir.

Q. Have you observed any unusual incidents in that locality?

A. Only through mining damages.

Q. Do you own property in that locality?

A. I do.

Q. Are you familiar with mining operations in

(Testimony of Edward Bolever.)

that locality insofar as they expressed themselves on the surface? A. Yes, sir, quite a bit.

Q. Have you had occasion to observe the effect of certain stresses or strains or forces on buildings; on buildings in the neighborhood of Ella Poague's property? A. Yes, sir.

Q. Can you disregard those things you have observed in the neighborhood and give us the valuation of a six room brick veneer house with a back porch and bathroom and a forty foot by one hundred fifteen foot lot with a garage, a brick and concrete garage on the rear end [170] such as you have seen, if the same was in sound condition what would it sell for in the City of Butte?

Mr. Dwyer: We object to the question as being indefinite and not relating to the specific property in question but relating to some theoretical or imaginary building. The question is incompetent, irrelevant and immaterial and doesn't tend to prove or disprove any issue of this case; what the imaginary building would be worth is not an issue in this case.

The Court: On the objection as made I will overrule it.

Mr. Dwyer: Exception.

A. The value of the property before the damage was done was around five thousand to fifty-five hundred.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: Denied.

Mr. Dwyer: Exception.

(Testimony of Edward Bolever.)

Q. You mean dollars; five thousand to fifty-five hundred dollars? A. Yes, sir.

Q. In its present condition have you examined it? A. Yes, I have.

Q. How much would you give for it or could you get for it in the City of Butte and what would it sell for on the Butte real estate market at the present time?

Mr. Dwyer: We object to the question as being involved, calling for three different answers.

The Court: Sustained.

Q. Did you examine the property recently?

A. Yes, sir.

Q. What is its present market value, Mr. Bolever?

Mr. Dwyer: To what property are you directing the witness' attention, to some imaginary building or the property in question?

Q. What is the value, the present market value, Mr. Bolever, of Ella Poague's property at 415 South Dakota street in Butte?

A. It's very hard to make an estimate of the value under the conditions because you find no buyers now days to buy in that locality.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: Denied.

Mr. Dwyer: Exception.

Q. Could you fix the money value of the Poague property at present?

(Testimony of Edward Bolever.)

A. No, I couldn't tell you just what the thing would bring on the market now.

Q. Has it any value?

A. Scarcely much value to any property that has gone as far as that has been damaged.

Q. What could it be sold for today?

Mr. Finlen: Objected to as calling for repetition.

The Court: Sustained.

Q. Has that property any value at the present time in your opinion?

Mr. Finlen: Objected to as calling for repetition. The witness testified he couldn't tell what it would bring on the market; scarcely has any value.

The Court: I will agree entirely with you, Mr. Finlen, but I will overrule the objection.

Q. Has that property any value at the present time in your opinion?

A. That's hard for me to say what the value would be at the present time.

Mr. Genzberger: That's all.

(Witness excused.)

EDGAR J. STRASSBERGER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. State your name to the court and jury?

A. Edgar J. Strassberger.

Q. How long have you lived in Butte?

A. Since '83 or '84.

Q. What is your profession Mr. Strassberger?

A. Civil and Mining Engineering.

Q. Where did you first study that profession?

A. Cornell University.

Q. And when?

A. From 1896 to 1900; and preparatory course in 1895.

Q. Did you graduate from that University?

A. Yes, sir; I graduated with the degree of Civil Engineering.

Q. After 1900 or at 1900 where did you begin the practice [173] of your profession?

A. From 1900 to the present time my practice was mainly in Butte, Montana.

Q. Have you practiced it elsewhere?

A. Yes, sir; in Peru, South America.

Q. Have you followed the profession of mining engineering as well as that of civil engineering?

A. Yes, sir.

Q. And in Butte? A. Yes, sir.

Q. Elsewhere in Montana? A. Yes.

Q. Anywhere else in Montana?

(Testimony of Edgar J. Strassberger.)

A. Yes, some; well, principally in Butte. I also took special courses in assaying and other branches of mining engineering.

Q. While your residence has been almost most of that time in Butte you have practiced your profession in other counties in the state?

A. Yes, sir.

Q. And elsewhere in South America?

A. Yes, sir.

Q. Are you acquainted with the property of Ella Pogue at 415 South Dakota street in Butte, Montana? A. I am.

Q. When was that first called to your attention, Mr. Strassberger? A. I think in 1945.

Q. Mr. Strassberger, when you first examined it did you make memorandum as to the date of your examination? [174] A. Yes, sir.

Q. Have you got it? A. I think so.

Q. Can you tell us the date when you first examined it?

A. Just previous to December 5th, 1945.

Q. Within a few days before that?

A. Yes, sir.

Q. Mr. Strassberger, can you give us the legal description of that property. I mean by lot and block number?

A. Lot Four and the north Ten Feet of Lot Five, Block Sixty-seven Butte Original Townsite, being a portion of the Nellie Lode, Survey No. 759, Lot No. 136.

Q. Can you now tell the court and jury what

(Testimony of Edgar J. Strassberger.)

condition you found the property in. First, tell what were the improvements upon the property?

A. The property consists of seven rooms including bath, an enclosed back porch and an open front porch. The building, including the porches, is 50.6 feet long overall and 27.6 feet wide overall. It's a brick veneer having wooden additions for the porches. In the rear is a solid brick and I believe tile constructed double garage built on concrete foundations. The overall dimensions is 20.2 feet by about 20 feet.

Q. What condition did you find the walls and floors, the windows and other parts of the front building in. That is, the building which you spoke of as having six or seven rooms?

A. Well, the south wall of the dwelling is bulged and shows a separation of the brickwork; the east wall facing Dakota street has several cracks in it; near the southeast [175] corner is some cracks between the joints making a sort of step, what we call step-cracks and also a horizontal crack. And further to the north on the front wall near the front entrance is a horizontal crack or separation of the brickwork, oh, about two feet long, and in the corner window of that same entrance there seemed to be a separation right in the corner a vertical separation, and some cracks close to that.

On the northeast corner there is some cracks appearing in the brickwork. On the west end of the building there is some cracks over a window near the northwest corner; and inside of the building

(Testimony of Edgar J. Strassberger.)

that crack appears in the room off of the kitchen, which is the north of the kitchen, and now used as a storeroom, the crack shows through there. The southwest corner of the building is located a bath where I observed some vertical cracks that were pasted up with paper. In the kitchen, on the east wall of the kitchen I observed some cracks. Going into the hall from the kitchen running toward the front of the building are several bulges on the south wall of the hall. The first room to the right and just east of thhe kitchen is a bedroom that shows considerable movement. Its west wall is badly cracked.

The ceiling shows cracks and movement. Across the hall to the north of that room I think it's a dining room. It looks in better condition except the floors; its floor is rather loose and shakes when you walk over it as if the foundation has settled below that room. East of that room is the parlor or front room. It has a sort of a bay window with an arch close to the window. That is cracked. [176] And in that room there are several cracks showing movement.

The room south of the parlor I think is a bedroom, used as a bedroom now; it looks in fairly good condition. There are some cracks in there of minor nature. The south wall of that room is formed by the south building wall which shows bulges mentioned a moment ago.

Q. What have you to say as to the doors?

A. Well, some of the doors stick when you open

(Testimony of Edgar J. Strassberger.)

them and other doors especially in the kitchen it swings open by itself and shows that the frame has been tilted.

Q. And as to the windows?

A. I didn't notice anything especial to the windows. There is some putty loose and cracks, but I could not attribute any cause associated with movement.

Q. Did you notice anything about the chimney. I mean the service chimney to the house?

A. Yes, there is a chimney there. It shows some settlement.

Q. Did you note anything about the transoms to the bedrooms?

A. The transoms appeared to be out of level.

Q. Mr. Strassberger, did you note a garage, a brick and concrete garage that is on the rear end of the lots which you have described, or lot and fraction of a lot?

A. I did.

Q. What condition was that it?

A. That was in a dangerous condition.

Q. Now describe in detail?

A. Well, the foundation walls of concrete are badly shattered and broken and fallen to the floor in places. [177] The south wall bulged and finally some of the brickwork fell out.

Q. About how much of the brickwork has fallen out of the south wall?

A. Well, I didn't measure but my recollection last time I was there seemed to be about four feet

(Testimony of Edgar J. Strassberger.)

up and down and maybe twelve or fourteen feet east and west.

Q. Did you take a photograph of that?

A. I did.

Q. Have you got it? A. Yes, sir.

Mr. Maury: Counsel informs me there is no objection to their introduction. We offer them in evidence. They are marked exhibits 12, 13, 14 and 15.

The Court: Received in evidence without objection.

(Plaintiff's Exhibits Nos. 12, 13, 14 and 15 were here received in evidence, the same being photographs of the garage and dwelling in question. They will be certified to the Circuit Court by the clerk of this court.)

Q. What is exhibit 13 a picture of?

A. The picture 13 is the west face of the west side of the brick garage and it just shows a part of the cracks on the south face that I testified about; cracks and bricks falling out.

Q. What is 14?

A. 14 is a picture taken previous to the one the jury is looking at now.

Mr. Genzberger: Make that number, please. Previous to 13 instead of the one the jury is looking at.

A. This got marked.

Q. Tell what it is? [178]

A. It shows the brickwork had settled and separated along the courses of the brick and bulged out.

Q. What is 12 a picture of?

(Testimony of Edgar J. Strassberger.)

A. 12 is also a picture of the west end of the building showing the garage doors and cracks in the building. May I look at that first picture? I think I gave the wrong face of it. 13 is the east face of the garage.

Q. What is 12 a picture of?

A. 12 is also a picture of the west face showing the entrance doors.

Q. Of the garage? A. Of the garage.

Q. And 15?

A. 15 is a view of the east front of the dwelling on Dakota street.

Q. Are these which have been marked 16, 17 and 18 also pictures of the Poague property?

A. Yes.

Q. Are they the pictures? A. Yes, sir.

Mr. Finlen: May I inquire of the witness as to what Plaintiff's exhibit No. 18 so marked purports to represent?

A. That shows a retaining wall under the fence of the building adjoining the Poague property to the north.

Mr. Finlen: I thought the witness said this represented the Poague property?

A. Part of it is the Poague property.

Mr. Finlen: We object to the reception in evidence of what has been marked plaintiff's exhibit No. 18 as without the issues of the case and not tending to prove or [179] disprove any of the issues of the case.

(Testimony of Edgar J. Strassberger.)

Q. (By Mr. Maury): Does this show the north wall of the Poague property?

A. It shows just a corner of the,—the northeast corner of the Poague property and her east fence.

Q. Does it also show something else?

A. Yes, it shows a cracked wall of the adjoining lot.

Mr. Finlen: We renew our previous objection and further add the objection it would only serve to confuse the issues in the case.

The Court: Does your record show anything has been offered in evidence?

Mr. Maury: Yes, we offered it in evidence.

The Court: You are offering Exhibit 18 in evidence, is that it?

Mr. Maury: Yes.

The Court: You make the same objection you just expressed?

Mr. Finlen: And the additional objection it is confusing in that the notation upon the back of the photograph——

The Court: Well, all of the writing on the back of the photograph except that placed on the back by the Clerk of the Court identifying it as an exhibit will be removed and the objection will be overruled and the exhibit will be received in evidence.

(Plaintiff's Ex. No. 18. a photo of retaining wall N.E. corner of Poague property was here received in evidence. Clerk will certify same to Circuit Court.)

Mr. Maury: There is a serial number D-2 on it.

(Testimony of Edgar J. Strassberger.)

I presume that is some mechanical number. I can't erase it.

The Court: Obliterate it if it can't be erased.

Mr. Maury: Do you want the writing obliterated, taken off? [180]

Mr. Dwyer: With the exception of that one.

Mr. Maury: We have taken it off.

The Court: I think all writings that don't pertain to the exhibit should be taken off.

Q. (By Mr. Maury): What is exhibit 17 a picture of?

A. 17 shows the cracks and the brick veneer at the southeast corner of the building that I testified about a moment ago.

Q. That is of the residence?

A. Of the residence, yes.

The Court: Has 17 been admitted in evidence?

Mr. Maury: We offered 17.

The Court: I didn't hear any offer. Does your record show any previous offer?

Mr. Dwyer: No objection to 16 and 17.

Mr. Maury: 16 and 17 are now offered.

Mr. Finlen: 16 and 17 may be received without objection.

The Court: Very well, they will be admitted without objection.

(Plaintiff's Exhibits 16 and 17 were here received in evidence, being photographs, and will be certified to the Circuit Court by the Clerk of this Court.)

Q. What is 16?

(Testimony of Edgar J. Strassberger.)

A. 16 shows the crack that I testified to a moment ago in the east wall, outside wall of the Poague residence; but, however, the photographer reversed the picture. He took it on the wrong side of the negative and it shows left instead of right.

The Court: Let me see the exhibit. Then it is your testimony, Mr. Strassberger, that because of the method [181] in which the photographer took the picture it does not accurately disclose the condition existed there?

A. It makes it left handed instead of right handed. It looks on the right side of the door when in fact it's on the left hand side of the door.

The Court: Well, Exhibit 16 will be stricken from the evidence.

Mr. Maury: No objection.

Q. (By Mr. Maury): Mr. Strassberger, have you made any study, continued, experimental with property in the immediate neighborhood of this and of brick and concrete construction before you examined this. Just answer whether you have or not? A. Yes, I have.

Q. And how long did that study continue, approximately?

A. From 1943, the year 1943 to the present time. However, I don't understand your question about making experimental tests.

Q. I call to your attention the property known as the Lloyd property somewhere west of this property? A. Yes, sir.

Q. How far west is it, or was it?

(Testimony of Edgar J. Strassberger.)

A. About ninety feet north and this west crossing alley behind the Poague property. It's on the southeast corner of Porphyry and Montana streets.

Q. Mr. Strassberger, were you once City Engineer of Butte? A. Yes, sir.

Q. At that time were you familiar with a certain plat of the elevations in the region of the Poague property? [182] A. Yes, sir.

Q. And were those elevations at that time recorded as correct and found to be correct whenever any work was done with reference to them?

A. Yes, sir; we used those elevations as official elevations at the block corners and alley corners.

Q. Are the elevations at the Poague property and in and around the Poague property the same as they were then? A. No, sir.

Q. Can you tell us whether they are higher or lower?

A. In places they are higher; in the main they are lower.

Q. When were you City Engineer?

A. 1920 to 1922, I believe.

Q. Mr. Strassberger, were you called on by Ella Poague or her attorneys to study the cause of the abnormalities that you found in her property?

A. Yes, sir.

Q. Did you feel that in order to determine the cause you must examine the surface of property surrounding it? A. I did.

Q. Had you previously made examination of

(Testimony of Edgar J. Strassberger.)

the property in the immediate vicinity of Ella Poague's property? A. Yes, sir.

Q. You may name one?

A. Well, the closest one would be the Lloyd property.

Q. And on what street corners would that be; was it?

A. It was on the southeast corner of Porphyry and Montana streets.

Q. Had you watched and experimented with that property [183] for a long period of time?

A. Yes, sir.

Q. At the request of the owners?

A. Yes, sir.

Q. And what had you noticed as to whether there was movement in the foundation and ground under it?

A. I observed considerable movement within the building and the foundations.

Q. And did you make a study of the cause of that movement? A. I did.

Q. Can you tell with relation to the Poague property where the Emma shaft is?

A. Yes, sir; it's about 500 feet north and 220 or 250 feet east.

Q. Can you tell from actual entrance the depth of that shaft?

A. Yes. I have maps furnished by the Company that gives the elevations of the shaft and the different levels.

Q. What was the depth of that shaft in 1945,

(Testimony of Edgar J. Strassberger.)

December, when you examined the Poague property?

A. Well, I couldn't give you that in feet without consulting the maps.

Q. Have you some map here you can consult?

A. I don't think at the bottom of the shaft.

Q. Can you give us the actual depth that you know of existing at that time?

A. May I examine?

Q. Yes, you may examine any data that's been given you by the defendant. Does that indicate the depth of the [184] workings from that shaft. My question is how deep was the shaft. May I ask a leading question. Was the shaft 1600 feet at least in 1945, December? A. Yes, sir.

Q. Now, were you given permission by the persons operating that shaft to go down and inspect the workings under the Ella Poague property?

A. I was.

Q. How often have you had that permission?

A. Ever since 1944 at times that I desired to go down.

Q. What Company gave you that permission?

A. I believe it was the A.C.M. Company.

Q. Anaconda Copper Mining Company?

A. That's right.

Q. And when you wished to go down who would you ask for permission?

A. I think Mr. Genzberger got me the original arrangements, or you; and I would contact either Mr. O'Kelly's office or Mr. Strandberg.

(Testimony of Edgar J. Strassberger.)

Q. Who was Mr. O'Kelly as to the Anaconda Copper Mining Company?

A. I believe he is the Chief Engineer.

Q. Does he function as Chief Engineer?

A. I believe he does; yes, sir.

Q. And has since 1944 when you first visited this shaft? A. That's right.

Q. Has somebody been deputed by the Anaconda Copper Mining Company to go with you on your visits underground?

A. Yes, sir; Fred Strandberg. [185]

Q. Is he in the courtroom now?

A. Yes, sir.

Q. He is also Assistant to Mr. O'Kelly?

A. I believe he is an Assistant to Mr. O'Kelly.

Q. Whose machinery did you go down on?

A. On the cage operated by the Emma mine.

Q. The Emma mine is not an entity?

A. No.

Q. Who operates the cage; I mean the Company?

A. The Butte Copper and Zinc and Anaconda Copper Mining Company.

Q. Were you furnished maps by the two Companies here as to the underground workings of the Emma mine with reference to the cross-section going under the Ella Poague property?

A. No, I was furnished plan maps of the sills and stopes from which I built up cross-section maps.

Q. Those maps are here, the plan maps?

A. Some of them.

(Testimony of Edgar J. Strassberger.)

Q. Did you build up and make a composite map of the plan maps that were furnished you?

A. A composite map of the sill maps furnished me.

Q. It does not contain the stopes?

A. No, sir.

Q. Have you that composite map here in court?

A. It's on your desk.

Mr. Maury: We are going to offer this. Do you wish it further identified?

Mr. Dwyer: We would like to interrogate the witness on that. [186]

Mr. Maury: Then we will interrogate first. I didn't know whether you wanted to object or not.

Mr. Dwyer: We reserve the right also to interrogate.

Q. (By Mr. Maury): I show you 19. What is 19?

A. 19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit.

Q. Does Ella Poague's property appear in outline? A. It does.

Q. Whereabouts on that plan map?

A. Coordinate 4600 north runs through it. Also coordinate 5300 west runs through the property.

Q. And is it built up and composed by you from data, plans and maps furnished you by a Company at the request of the plaintiff's attorneys, Mr. Genzberger and myself? A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. And have you been present when such requests were made, or some of them?

A. Some of them. I have been present several times.

Q. And these plans would be furnished pursuant to those requests? A. Yes, sir.

Q. And from that you have made this 19?

A. Yes, sir.

Q. And now tell what Exhibit 19 shows and what the different coloring on No. 19 means?

A. This map shows by the most simple explanation I can give you would be if the surface of the earth itself was like glass and you could look down in depth and the sill maps which would be represented like tunnels at [187] different levels, the first level would be 300 feet from the surface, the next level 100 feet, or approximately. As you go down like that you look down upon all those levels; they don't stand right under each other but one level goes more to the north than the next level, and looking down at all these levels they would give you a picture as you see on this composite map. The different colorings represent the different tunnels and different levels as you go down, and they are marked on the map from the 200 down to the 1600.

Q. Tell whether the vein of the Emma goes into the ground vertically, or on a slant or slope or dip?

A. It goes on a slope or dip from the vertical.

Q. About how much from the horizontal does it dip?

A. It dips various degrees at different places.

(Testimony of Edgar J. Strassberger.)

I would say you would find an average of 57 degrees dip in many places.

Q. And by dip what do you mean?

A. I mean that if you go down the shaft, say to a hundred feet depth,—or let's go down 200 feet and get to the tunnel that's marked 200, you would find a vein there. Then if you go down say to the 500 level you would find that same vein to the south several hundred feet. In other words, it dips like the roof of a building.

Q. Can you tell the jury what a vein is?

A. Yes, a vein is—it has characteristic features. It is composed of quartz and other minerals of varying width between what we call walls of a different material. The veins carry ore which in turn carry values in different metals, silver, gold and manganese. [188]

Q. What is meant by the strike of the vein?

A. The strike of the vein is along the course of the vein from one end to the other on a level.

Q. Through the country?

A. Through the country.

Q. As it appears at the outcrop?

A. Yes, it could be at the outcrop; it could be below, too.

Q. Are the different colors on this composite map marked with the numbers of the various levels which the colors represent? A. They are.

Mr. Maury: We offer it in evidence.

Mr. Finlen: No objection.

(Testimony of Edgar J. Strassberger.)

The Court: The exhibit will be admitted without objection.

(Plaintiff's Exhibit No. 19, a plan map prepared by the witness, was here offered and received in evidence. The same will be certified to the Circuit Court by the Clerk of the Court.)

Q. Mr. Strassberger, point out to the ladies and gentlemen of the jury where on 19 and on the surface Ella Poague's property is?

A. Well, upon the surface,—we are on the surface now and the Ella Poague property is shown by these pencil lines, these rectangular lines that I am tracing with my pointer.

Q. Who traced in these cross-lines on the map?

A. What do you mean by the cross-lines, coordinate lines?

Q. Yes, coordinate lines? [189]

A. They were printed originally on the paper.

Q. Has Mr. Strandberg done some of the work on this map as to some of the lines?

A. I notice some lines on there I didn't put on. I believe he placed on that map as he has on other maps the Ella Poague property. I checked it up.

Q. And it's correct?

A. It's correct, yes.

Q. Now, does this map exhibit all of the excavations in the area which it covers, or just some partially? A. Just partial.

Q. Explain to the ladies and gentlemen of the jury why it is partial and what cannot or is not on the map?

(Testimony of Edgar J. Strassberger.)

A. Well, the simplest way to do that,—if this floor would be one of the levels, one of the colors, and the ceiling is another level, that's all that shows of this level and the level up above. However, other workings have been done on those levels what's called stopes. They have dug the ore from this level where the floor is along the dip of the vein up to the level above, and in the same way down from the surface as far as they have gone to the depth of the mine.

Q. And did you, on your examinations, find that stoping had taken place at places?

A. Pardon me, Mr. Maury. I may have mis-spoken myself by saying that from the surface. The nearest, the upper level to the surface that I have any knowledge of where operations was performed on an extensive scale would be 200 feet from the surface. In other words, 200 feet from the Collar of the Emma shaft; approximately [190] 200 feet.

Q. Did you find stoping had been done when you visited the mine in 1944 and at other times, from the 200 level down? A. Yes, sir.

Q. Describe in a general way how extensive that stoping was insofar as it concerns the Ella Poague property and the vertical under it?

A. It's been rather extensively stoped from one level to the other in a plane and in that plane I built a map to show the stoping on that dip that goes under the Ella Poague property.

Q. Have you that map here?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Mr. Maury: Will you mark this 20-A and 20-B. It's two sections of the same.

Q. Mr. Strassberger, tell the court and jury what 20-A and 20-B are?

A. I will try to as simple as I can. I have already explained what the sill maps are. If we just instead of going through all the 16 levels take 2 levels, one would be your ceiling and the other the floor. Now this map represents what you would see if you would cut the earth north and south and then getting out on the side and looking at the ends of these various levels or sills, and between the sills and on the dip you will see the stopes. You will note the stopes are where the ore and containing the metals were extracted. In other words, if you are on this level here you have a sill above and sill below us, and standing at the west end [191] of this room and looking where you cut the earth and say right at this point they were on the vein. They wished to take the ore out to the sill above. Well, that vein would show coming on a dip to that corner of the room down diagonally toward the floor; and when you stand over there to the west and look at the end of all these veins or stopes you would see a picture shown on this diagram.

Q. What is the general course through the country, or strike as you call it, of the Emma vein?

A. Northeasterly and southwesterly.

Q. I will ask you if any vein is exactly the same

(Testimony of Edgar J. Strassberger.)

on a strike or if that is just a general course or strike?

A. The course would be between any particular point. Sometimes we find a vein on the surface that goes quite a distance in the same direction and then at other times it will vary like the track of a snake.

Q. They are not straight affairs?

A. No, not entirely straight.

Q. Is this the north south section under the Poague property? A. That's right.

Mr. Maury: We offer it in evidence; plaintiff's exhibits 20-A and 20-B.

Mr. Finlen: No objection.

The Court: Very well, admitted in evidence without objection.

(Plaintiff's Exhibits No. 20-A and No. 20-B were here received in evidence. The same are maps underlying the Poague property. (Stope maps.) The same will be certified to the Circuit Court by the Clerk of this court.) [192]

Q. Mr. Strassberger, you know which is "A" and which is "B." Put "A" above "B," or which-ever should go above.

A. Yes, sir. I wonder if I could explain one point about these maps?

Q. You wish to explain something about "A" and "B" of 20?

A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A.C.M. Company. Well, I

(Testimony of Edgar J. Strassberger.)

don't know exactly who printed the maps but they were delivered to me either personally by Mr. O'Kelly or Mr. Strandberg, or the attorney for the plaintiff.

Q. That was Mr. Genzberger or myself?

A. That's right.

Q. One or the other? A. Yes, sir.

Q. Mr. Strassberger, in your visits underneath the surface of Ella Poague's property did you find any evidence of sinking or settlement of ground?

A. Yes, sir.

Q. Describe to the court and jury what you found in the way of sinking or settlement?

A. I found big mining timbers crushed.

Q. Big mining timbers. That means nothing to the ladies and gentlemen on the jury. Give some size.

A. A post in these sills, these tunnels, all the way from twelve to sixteen inches.

Q. In diameter?

A. In diameter. I would consider heavy timber put in [193] to support heavy and moving ground. These timbers I found in a great many places, including the timber on top of these posts which is called the caps, would be shoved out of line both laterally as you walk in and sideways; many of them cracked.

Mr. Finlen: If the Court please, we move to strike the answer as not responsive. It appears from the answer he indicated what he found in a great many places. The question was directed to what

(Testimony of Edgar J. Strassberger.)

he saw underground by way of sinking or settlement beneath the Poague property.

Mr. Maury: I will modify the question and in the immediate—— (interrupted).

Mr. Finlen: Just a minute. May we have a ruling on the motion with regard to the answer.

The Court: The motion will be denied. I can't assume from the testimony of the witness he is not talking about the area included or indicated by the question. The answer itself does indicate that so the motion will be denied.

Q. Mr. Strassberger, you may continue your description?

A. Would you frame another question?

Q. I will frame another question. Mr. Strassberger, have you noticed a change in the surface of the earth and escarpments in the region of the Poague property?

A. Yes, sir.

Q. In your experience and knowledge and study as a Mining Engineer and in the studies of others does the excavation and the settlement caused by it always extend immediately above the excavation, or does your profession [194] know something that is called an area of draw?

A. Both.

Q. Both above and in the area of draw?

A. Both. You are dealing with subsidence and asking a question regarding subsidence being vertically above the excavation or does it extend out of the bounds of vertical lines?

A. Yes, sir.

A. And my answer, it does both. In other words,

(Testimony of Edgar J. Strassberger.)

the surface will sink vertically above the excavation and also areas outside of that vertical line.

Q. In the areas outside of the vertical, what is that sinking called?

A. We have a number of technical terms. In order to carry on a discussion of subsidence—but as simple as I can make it and using some of the terms the one you asked me about is called the angle of draw. In other words, if the excavation is square like that and from, say from this floor to the ceiling a vertical line would go straight up to the earth. When that ground starts to subside if you carry those lines straight up to the earth's surface that would be a vertical subsidence. However, study of this problem shows the cracks on the surface extend both sides of the vertical line.

Q. Both sides or all sides?

A. Well, you are bringing in a further condition. It extends as far laterally as the excavation is laterally. However, I wouldn't say there is any angle of draw in a lateral or along the strike of the vein, but a cross section angle of draw is along a plane like this vertical [195] section showing the ground has started to move both, in the case of Butte, both north and south of that particular excavation you have under consideration. In other words, if that excavation is a hundred feet wide north and south and you extend that to the surface you got a vertical subsidence one hundred feet wide. However, experiments and studies show that may extend north several hundred feet and south several

(Testimony of Edgar J. Strassberger.)

hundred feet, so the effects of that one excavation only one hundred feet long north and south underground may be several hundred feet in extent on the surface.

Q. Are there examples of that phenomena near the Ella Poague property and over the workings of the Emma mine and to the west?

A. I would say, yes.

Q. And have you observed this extension westerly as far as the corner of Gold and Jackson streets?

A. I have examined what I consider an apex of the Zaroma-Emma mine from the corner of Jackson and Gold Sts., northeasterly for close to a mile or half a mile. Say a half a mile.

Q. And is the area subject to the angle of draw increasing as the depth of the excavation?

A. Naturally.

Q. I mean does it, not naturally?

A. Yes, sir.

Q. That is a law of nature?

A. Yes, it's a physical effect of the excavations.

Q. Have you noticed the effects of the angle of draw to the west of this property on Montana street? [196]

A. No.

Q. You have not?

A. I am probably not answering your question. Yes, I can see the effects of the angle of draw west of the Poague property and also east of the Poague property, and it extends south of the Poague prop-

(Testimony of Edgar J. Strassberger.)

erty several hundred feet and north of the Poague property a less number of feet.

Q. By a less number of feet, about how many feet to the north?

A. The apex that I just mentioned or that you asked me about striking from Gold and Jackson street?

A. Yes.

A. Runs across Dakota street approximately on the north boundary of its intersection with Silver Street. Now that would be about 500 feet north of the Ella Poague residence, and going south where we find an escarpment or a surface subsidence in front of what is known as the Llewelyn property—there is a picture of that—at a distance of about, well, I can measure it on the map. It's something over 500 feet; maybe seven or eight hundred feet south. From those two points from Silver street down to below Gold street or Platinum street. Half-way between Gold and Platinum street would be only area of draw at that particular point going down through the Ella Poague property, or say, the west line of Dakota street.

(Recess until 2 p.m. same date.)

Q. Mr. Strassberger, you were speaking of what is called the angle of draw as court adjourned.

A. Yes, sir. [197]

Q. Have you seen evidences in the immediate vicinity of the Poague property?

A. I have.

(Testimony of Edgar J. Strassberger.)

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial; not tending to prove or disprove any issue in this case.

The Court: Overruled.

Q. Describe some of those evidences?

A. Well, about to the north of the Poague property is an escarpment or a breaking of the surface of the ground crossing Dakota street at the north line of Silver and proceeds southwesterly and shows on the various streets going westerly to Gold and Jackson street.

Q. And about how far would that be, about two-fifths of a mile, may I ask?

Q. Well, it would be something like that; a half a mile I imagine.

Q. Are there excavations immediately under that escarpment?

A. You mean vertically?

Q. Yes.

A. No, I believe the most of the excavations are south of that escarpment. There may be a few north that I haven't examined.

Q. Have you seen where there has been a drawing over a wide angle there and not from the vertical at all? A. Yes, sir.

Q. And has that been noticed by other distinguished engineers?

Mr. Dwyer: Objected to as calling for a conclusion of [198] the witness.

The Court: Sustained.

Q. Mr. Strassberger, have you taken photographs of the conditions of the mine, the Emma

(Testimony of Edgar J. Strassberger.)

mine down the slope and close to the Poague property?

A. I have taken a number of photographs in the sills on north, east and west of the Poague property, surrounding the Poague property.

Q. And do like conditions prevail in the mine under the Poague property? A. Oh, yes.

Q. You have walked back and forth down the vein under the Poague property?

A. Along the vein; yes, sir.

Q. Along the vein?

A. Along various openings.

Q. This morning you spoke of caps and posts having been put out of place and crushed?

A. Yes, sir.

Q. Is Exhibit 20 a picture of such conditions as you described in the Emma mine?

A. Yes, sir.

Q. And close to being under the Poague property?

A. It's in the Emma mine and I believe that's on the 600 sill; yes, that's on the 600 sill.

Q. And about how close to the Poague property, or being down the vein from the Poague property?

A. Well, it's in that area of subsidence. I can't tell without consulting the maps or records, but it's in that spot where I took the picture. It's in that area. [199]

Q. In the area of the Poague property?

A. Yes.

Mr. Maury: We offer it in evidence.

(Testimony of Edgar J. Strassberger.)

Mr. Dwyer: We object to the picture as incompetent, irrelevant and immaterial and doesn't tend to prove or disprove any issue in this case; not being located, the exact location to show whether it was a drift or cross-cut or stope, or what it was.

The Court: The objection is overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 21 here received in evidence, Exhibit is photo of a condition in Emma mine. The same will be certified by the Clerk of this Court to the Circuit Court.)

Q. Is this a photograph of a condition that you have found in the Emma mine and in the proximity of the Poague residence?

Mr. Dwyer: We object to the question as leading and suggestive. The witness should be shown the picture and let him tell what it is. Counsel is telling him what the picture is.

The Court: Sustained.

Mr. Maury: I was saving time and I will modify it.

Q. What is that a picture of?

A. That's a picture of the underground workings of the Emma mine on the 200 foot level about 100 feet I should judge west of the Emma shaft.

Mr. Maury: We offer it, Exhibit No. 22.

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; not tending to prove or disprove any issues in this case. [200]

The Court: The objection will be overruled and the exhibit will be admitted in evidence.

(Testimony of Edgar J. Strassberger.)

(Plaintiff's Exhibit No. 22 was here received in evidence. The exhibit is a photo of a condition in the Emma mine. The same will be certified to the Circuit Court by the Clerk of this Court.)

Mr. Dwyer: To save time on the objections, are those other pictures of the underground workings?

Mr. Maury: Elsewhere they are.

Mr. Dwyer: May the same objection go to the other pictures of the underground workings.

The Court: Yes, the same objection of counsel will go to the photographs of the underground workings of the Emma mine and the same ruling of the court will be considered, and defendant will be granted an exception in each instance and as to each ruling of the court.

Q. What is Exhibit 23?

A. Exhibit 23 is a sill floor on the 600 foot level showing conditions of subsidence in that area.

The Court: I doubt the propriety of showing the jury an exhibit not received in evidence.

Mr. Maury: I offered these and submitted them to counsel. I offer all four of them in evidence. They are Nos. 23, 24, 25 and 26.

The Court: Well, Exhibit No. 23 will be admitted at this time and the others will not be as there is no foundation laid as to the others. There is no testimony as to what they are. Exhibit No. 23 will be admitted.

(Plaintiff's Exhibit No. 23, photo of sill floor 600 foot level Emma mine here received

(Testimony of Edgar J. Strassberger.)

in evidence. The same will be certified by the Clerk of this court to the Circuit Court.)

Q. What is Exhibit No. 24? [201]

A. Exhibit No. 24 is also a picture of a sill floor showing a large cap broken and posts out of line. That's on the 600 sill and shows conditions of subsidence.

Mr. Maury: We offer it in evidence, Exhibit No. 24.

Mr. Dwyer: Same objection.

The Court: Objection overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 24, a photo of sill floor 600 ft. level Emma mine here received in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

Q. Is the top designated on that?

A. Yes, sir.

Q. What is Exhibit No. 25?

A. Exhibit No. 25 is a picture of octagonal sets that are placed rather close together, solidly built, designed to withhold the ground in a subsidence area. That's on the 300 sill.

Mr. Maury: We offer it in evidence.

Q. Of the Emma mine?

A. Yes, sir; of the Emma mine.

Mr. Maury: We offer it in evidence.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 25, a photo of sets in Emma mine, 300 sill, here received in evi-

(Testimony of Edgar J. Strassberger.)

dence. The same will be certified by the Clerk of this court to the Circuit Court.)

Q. Have you seen the place where these octagonal sets are or were, recently?

A. Yes, sir; the 28th of March.

Q. Of this year? A. Yes, sir. [202]

Q. And how does their condition now correspond with what was shown by this picture?

A. It shows a continuance of subsidence that has separated joints of those octagonal members and thrown a great many of the sets out of line and crushed part of the sets.

Q. About when was the picture taken?

A. This picture was originally taken in September, 1943.

Mr. Maury: We offer it in evidence, Exhibit No. 25.

Mr. Dwyer: Same objection.

The Court: It's been offered and received.

Q. What is Exhibit No. 26?

A. No. 26 shows a cave of the ground and on the 200 foot level a little west of the shaft. It may be a little south also, but it's close to the shaft and west of the shaft.

Mr. Maury: We offer it in evidence, Exhibit No. 26.

Mr. Dwyer: Same objection.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 26, a photo of cave of ground 200 ft. level Emma mine was here

(Testimony of Edgar J. Strassberger.)

received in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

Q. Mr. Strassberger, can you tell us whether the area of subsidence above an excavation is greater or less with an incline excavation than one nearly vertical?

Mr. Finlen: We object to that, if the court please, as calling for speculation and guess; it doesn't furnish sufficient fact upon which to predicate a conclusion.

The Court: Overruled. The witness is testifying as an expert as I understand it.

A. Where the excavation is vertical the reflection on [203] the surface is closer to the vertical line than if the excavation was on an incline. The incline would show a wider area across the excavation than a vertical excavation.

Q. Can you tell the jury the effect of opening such rock as encloses and is in the Emma vein of oxygen and water percolating through?

A. Well, they will cause a disintegration of the rock walls, soften them up, and will result in crumbling and sliding. It's one of the elements of subsidence.

Q. Can you tell the jury whether there is always some water running through the mines of Butte?

A. At places it's very wet and at some places not quite as wet, but there is generally water in the cracks and crevices.

(Testimony of Edgar J. Strassberger.)

Q. Where does that water come from?

A. Some comes from the surface and some from underground.

Q. Can you see evidence of water or see water in the Emma mine on the various levels?

A. Yes, sir.

Q. And is there ever in the mining there any evidence of excluding oxygen from the excavations?

A. Well, it would be pretty hard to exclude all the oxygen, but in cases of caving, in closing off the entrances the oxygen gets pretty rank and it would be dangerous to enter.

Q. What is the effect of blasting on the surface. I mean blasting underneath and in a vein?

A. Blasting sets up a vibration that can be heard and [204] at times felt on the surface.

Q. And what, if any, effect have those vibrations even outside of the rock actually fractured by the blast?

A. It tends to weaken them.

Q. What effect does a weakening and sinking of adjacent areas to a piece of land have on the area?

Q. Well, it makes it unstable; any place where the sinking occurs the ground adjacent to it is in an unstable condition.

Q. Having examined the adjacent areas as you say you have, the underground workings of the Emma mine, and also observed the settlement and subsidence of the residence and garage of Ella Poague, what in your opinion is the cause of that settlement of the garage and the residence?

(Testimony of Edgar J. Strassberger.)

A. I believe it's due to the underground workings in the Emma mine.

Q. What adjacent area does that movement show in?

A. Well, it shows west of the Poague property quite a distance, some distance beyond Washington street. That would be three or four blocks west and some distance beyond that; and to the east it shows, a block east of Dakota street is Colorado street.

Q. Yes.

A. And some big buildings there, a school building was razed on account of becoming damaged through subsidence.

Q. Is that east of the Poague property?

A. Yes, that's east and a little north, and some evidence further east than that; and south you find evidence three or four blocks south of the Poague property. and north; two blocks north.

Q. And throughout the entire area you have described you see evidence of settlement?

A. Yes, sir.

Q. And what in your opinion is the cause of it?

A. The underground workings in the Emma mine.

Q. Now you can tell the jury what the evidence is that you have seen in that area?

A. Well, I have seen cracks in the pavements, breaking up of the sidewalks, destruction of quite a number of buildings; I have noticed curb boxes

(Testimony of Edgar J. Strassberger.)

and water pipes sheared off; light poles leaning at quite an angle to the upright. That's all I can think of right now.

Q. What, if any, escarpments are there on Dakota street immediately south of Ella Poague's property; south of Silver street?

A. South of Silver?

Q. Yes?

A. Well, the most pronounced one crosses Dakota north of Mrs. Poague's on Porphyry street. There is a large one—well, the sidewalk south of Mrs. Poague on Dakota street; about a block south to Gold I believe is the next street. Then south of Gold street is a large escarpment that cuts across Dakota street and cut in under the Llewelyn property. It shows on both sides of Dakota St. where the sidewalk has made a very pronounced dip in there, probably a drop of a foot.

Q. Can you tell the court and jury if those escarpments are usually somewhat parallel to the strike of the Emma vein?

A. They are pretty general to the same strike.

Q. Mr. Strassberger, what effect on water-mains and water pipes when they are in service has subsidence of the earth around?

A. Well, they have the effect where the ground is moving like that to cause leaks, cause the joints to telescope or pull apart and to be thrown out of line.

Q. Have you seen that where it had actually happened to water pipes in that area?

A. Yes.

(Testimony of Edgar J. Strassberger.)

Q. And how close to escarpments?

A. Well, there was one on Idaho and Porphyry that the ground was open two consecutive times and the water rushed to the ground in quite heavy volumes. I have noticed a good many openings but paid no special attention to whether they were telescoped or pulled apart, but they occur very often in that district.

Q. Whereabouts do you live; where is your residence?

A. 303 South Idaho; right on the corner of Silver St.

Q. Now what effect does it have on gas mains that are in service?

A. Well, it would have the same effect on all mains, all pipes.

Q. Have you seen the results or a result of that effect somewhat south of Ella Poague's property on an early morning of February 22nd some years ago, or the 23rd?

A. In the neighborhood of?

Q. Placer? A. Placer?

Q. Yes, the corner of Placer and Platinum?

A. I recollect an explosion down there. [207]

Q. Did you see the gas mains exposed there that morning or the morning after?

A. Yes, I saw the Montana Power Company trucks and men working there.

Q. Did you look down into the ditch?

A. Why, yes, I did.

Q. Could you see what the effect had been. I

(Testimony of Edgar J. Strassberger.)

don't mean on the adjacent property, I mean the effect on the gas main?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; it doesn't tend to prove any issue in the case.

The Court: I think that's asking for the effect of the explosion on the gas main. If that's the purpose I will sustain it.

Q. Was that in the region of subsidence?

Mr. Dwyer: We object to the question as incompetent, irrelevant and immaterial. The witness hasn't shown himself familiar with this particular locality or that he knows anything about what caused the break there; that he ever saw it before or afterward.

The Court: I will overrule the objection.

Mr. Dwyer: Exception.

Q. Was that in the region of subsidence?

A. As I recall that spot I examined a property known as the Nelson property that was subject to subsidence and if my recollection is correct this explosion we are talking about was within a short distance of the Nelson property.

Q. Immediately north? [208]

A. Yes, I believe just a little north.

Q. And does it adjoin, does the lot in front of which this explosion occurred adjoin the Nelson lot on the north?

A. That's my recollection. On Placer street.

Q. Mr. Strassberger, calling your attention to No. 19. Were all of the photographs taken within

(Testimony of Edgar J. Strassberger.)

the area, I mean all that have been admitted taken within the area shown on No. 19; all the underground photographs? A. Is this No. 19

Q. Yes?

A. Yes, sir; I believe they are.

Q. Point out to the jury the excavations that are under the parallelogram here and describe what the excavations are under the parallelogram known as the Poague property?

A. On the plan map the excavations that are vertically below the Poague property is a part of the 600 foot level and a portion of the 800 foot level, yellow and the pink.

Q. And on 20-B point out the portions that are directly under the Poague property?

A. The Poague property is represented in the yellow square on the surface. This dark line represents the surface and Porphyry street is north and Gold is south. You are asking me for the section of the underground mining vertically below that property?

Q. Yes.

A. This section map cuts the Poague property near the Dakota street line and exposes along that section this stoping area. We will put the letter "A" under Poague [209] and "B" and "B-2" and "A-2." The stoping area under the Poague property along this particular section shows at "C," "D," "E" and "F." That portion of a vein on that one section is represented by "C," "D,"

(Testimony of Edgar J. Strassberger.)

“E” and “F” and is vertically below the Poague property?

Q. Mr. Strassberger, directing your attention to No. 18, a picture of rock fractured just north of the Poague property. What course or strike has that fracture?

A. Well, I wouldn't call it a fracture.

Q. What would you call it?

A. It's more of a subsidence and the rock granite foundation under the fence has dropped and the sidewalk at that point has also dropped and exposed where they put the mortar in between the courses of the joints. That's washed out and left a space that looks like cracks.

Q. Is that a subsidence of part of that well?

A. I would consider it so.

Q. What is the strike of the subsidence there as regards the Poague property?

A. I don't think there is enough evidence at that point to give the strike, a subsidence strike.

Q. Where is the chimney of the Poague property with reference to that?

A. It would be southwesterly.

Q. And how far?

A. Oh, I would judge forty feet.

Q. And have you seen any evidence of subsidence in that chimney?

A. Yes, sir; it's settled.

Q. Mr. Strassberger, what have you to say as to whether [210] there is one system of mining depicted on No. 19, or more; or is it all one system of mining?

(Testimony of Edgar J. Strassberger.)

A. Which is No. 19, this one?

Q. No. 19 is the composite?

A. This one? Well, it's one system of mining; stoping at different veins or branches off from the veins—spurs.

Q. Through what shaft is all of the ore there extracted?

A. I believe most of it's extracted through the Emma shaft although there is a connection between these workings and the Travonia shaft that lies some distance to the southwest.

Q. About how far would the Travonia shaft be?

A. I would judge less than a mile.

Q. Would you say as much as three-quarters of a mile?

A. About, maybe. I never measured it.

Q. Is the Travonia shaft under the same management?

A. I believe so.

Q. You have seen the same men in charge of both places?

A. I don't know what you mean by the men in charge. Mr. Strandberg accompanied me on all my examinations and that's as far as I considered who had charge.

Cross-Examination

By Mr. Finlen:

Q. Mr. Strassberger, is there any foundation under either of the porches at the Poague dwelling?

A. Did you finish your question? I don't believe I understood you, Mr. Finlen.

(Question repeated.)

(Testimony of Edgar J. Strassberger.)

A. I don't recall any foundation under the porches themselves. [211]

Q. I am referring now to the artificial foundation, of course, such as concrete or some other man placed?

A. I believe it's a four by four post but I am not certain.

Q. That would be under what porch?

A. The front porch.

Q. And what with reference to the back porch?

A. I think that is right down to the ground.

Q. Now the foundation of the dwelling itself excluding the porches is constructed of what?

A. Rubble masonry.

Q. Did you find any cracks in that foundation?

A. It's pretty hard to determine any cracks in the rubble masonry wall.

Q. Will you answer my question, please?

A. I can't say I found any cracks in the rubble walls.

Q. By the way, what is a rubble wall?

A. It's just chunks of granite or other rock laid in courses of mortar and built up into a wall.

Q. Mr. Strassberger, showing you plaintiff's Exhibit No. 18, what does that depict?

A. That depicts a rubble masonry wall under a fence.

Q. And that is not the Poague fence?

A. It's adjoining the Poague property on the north.

(Testimony of Edgar J. Strassberger.)

Q. In other words, it's the property other than the Poague property? A. Yes, sir.

Q. You were City Engineer of the City of Butte?

A. Yes, sir.

Q. When? [212]

A. I think it was 1920 and 1922 if I am not mistaken. 1920 to 1922.

Q. And as such City Engineer, or at least during that period, you consulted a plat showing certain elevations in the neighborhood of the Poague property?

A. Well, I can't say any special points. I had the general supervision over grading and laying of sidewalks and we had it in all sections down that way.

Q. Didn't you testify this morning, Mr. Strassberger, that during the period you were City Engineer you consulted a plat showing certain elevations in the Poague neighborhood?

A. That's true, I did.

Q. Did you also testify you verified certain of those elevations? A. That's true.

Q. What particular elevations did you verify at that time?

A. Now what time are you talking about?

Q. The time you were City Engineer of the City of Butte.

A. No, I don't think we got that straight. After I was City Engineer I ran levels in connection with the subsidence matter. Not when I was City Engineer, but subsequent to the time I was City Engi-

(Testimony of Edgar J. Strassberger.)

neer I ran a set of levels over a greater part of that subsidence area.

Q. Did you verify any elevations on any plat or map that showed an elevation that you consulted when you were City Engineer?

A. I used the same official elevations that were in evidence at the time I was City Engineer. They are [213] published in book form.

Q. At the time you were City Engineer did you verify any of those elevations which you used, and if so, state which?

A. I am not able to do that. We used the bench marks all the time. We had crews out.

Q. The bench marks you used, were any of them at the time you were City Engineer verified by you. That's a simple question?

A. Either by myself or the crews under me. I didn't run the instruments.

Q. Did you verify any elevations?

A. I don't recall.

Q. Did you testify this morning that elevations in the neighborhood of the Poague property have changed as determined by you since you were City Engineer? A. Yes, sir.

Q. What elevations?

A. Elevations of the block corners and alley corners.

Q. What block corner or what alley corner?

A. Most of the block corners and alley corners from Silver street south to Gold and from Montana street west to Colorado.

(Testimony of Edgar J. Strassberger.)

Q. Let's take a little larger area than that, Mr. Strassberger. Let's take the area between Main Street and Jackson and between Mercury and Gold?

A. Yes, sir.

Q. Have you verified any change in elevation in that area?

A. My present recollection of the area that I verified [214] elevations is between the limits I just testified to.

Q. I am directing your attention to the limits stated in my last question?

A. I would have to look up my records to determine that.

Q. The area bounded by Main street and Jackson street and Mercury street and Gold street?

A. I don't think I verified all of them, though.

Q. Did you verify any elevations in that area?

A. Yes, sir.

Q. Which one?

A. I would have to refer to my notes and plats.

Q. Where are your notes and plats?

A. Down in the office.

Q. In Butte? A. Yes.

Q. Are they available? A. Yes, sir.

Q. Will you bring them here after the recess this afternoon?

A. Yes, sir; if I can lay my hands on them that quick.

Q. In any event they are at your office and you can produce them from that office?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. Will you do that, please?

A. Yes, sir; I will be glad to.

Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butter Copper and Zinc Company. Is that true? [215]

A. I figured that was true when I testified.

Q. What caused you to figure it?

A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.

Q. Under lease from the Butte Copper and Zinc Co.? A. That's my understanding.

Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?

A. No, that's outside of my jurisdiction.

Q. Why did you say you were lowered on a cage that was operated by the Butter Copper & Zinc?

A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.

Q. Then you don't know who operated the cage that lowered you?

A. No, certainly not; no, I don't.

Q. Did you testify this morning, Mr. Strassberger, that you were furnished maps, plan maps of sills and stopes by the two companies?

(Testimony of Edgar J. Strassberger.)

A. Yes, I did and I tried to correct that. I explained that the maps were made by either one or both companies, I don't know who; but they were furnished me by Mr. O'Kelly, some by Mr. Strandberg, and some of the other maps were delivered to Mr. Genzberger and he delivered them to me and I presume they were made by either or both of those two companies. [216]

Q. What caused you to presume they may have been made by the Butte Copper & Zinc?

A. Well, only that it seems to be common knowledge that's the Butte Copper & Zinc and being operated by the Anaconda Copper Mining Company.

Q. And from that you concluded the Butte Copper & Zinc prepared the maps?

A. I concluded that either one did it. I don't know which did it. I wasn't present when the maps were made.

Q. You know the employer of Mr. William O'Kelly don't you?

A. The Anaconda Copper Mining Company.

Q. You know the capacity he is employed by that Company?

A. I think Chief Engineer.

Q. You know the employer of Mr. Strandberg?

A. The same company.

Q. In what capacity?

A. I believe he is principal assistant to Mr. O'Kelly although I don't know; I assume that.

Q. You certainly don't have any knowledge or information or ground to suspect they are employed by the Butte Copper & Zinc?

(Testimony of Edgar J. Strassberger.)

A. I don't know, Mr. Finlen.

Q. Directing your attention, Mr. Strassberger, to plaintiff's exhibits No. 20-A and 20-B which are pinned on the blackboard. Are they drawn to scale?

A. Yes, sir.

Q. Is the horizontal the same scale which was used to determine or to depict the vertical? [217]

A. Fifty foot to the inch.

Q. They depict among other things the underground excavations beneath the Poague property?

A. Yes, sir.

Q. And you visited such excavations. Is that correct?

A. Well, I have walked through most of those sills where the ground was open for inspection. Many places they were blocked off and I couldn't enter.

Q. I am asking you whether or not you visited any area underground vertically beneath the Poague property?

A. Well, I would have to refer to all my maps showing what particular sill level I could go through and what I couldn't go through before I could answer such a question.

Q. You didn't have to refer to any such map when you answered Mr. Maury's questions?

A. I think I testified it was in that area.

Q. Didn't you testify you were under the building? Didn't you testify?

A. Pardon me, Mr. Finlen. I testified as I under-

(Testimony of Edgar J. Strassberger.)

stood the question to point out what workings were vertically under the Poague property. To answer your question I would have to consult my records to see if I was able to walk directly under the building or had I just the map showing the condition.

Q. In other words, at this time you don't know whether you were ever in an excavation vertically beneath the Poague property?

A. I think that's the way I stated.

Q. Didn't you testify this morning you had walked along the vein under the Poague property?

A. Well, there is a question there whether it's vertically below or diagonally below. I been several hundred feet below.

Q. Diagonally below would be under the Poague property. As an Engineer wouldn't you say that would be under the property?

A. I believe you would.

Q. Diagonally below?

A. Yes, a lower elevation.

Q. Where is the nearest underground excavation vertically below the Poague property that you know of?

A. I just testified it was the six and eight, I believe, hundred sill.

Q. How far is that from the surface of the Poague property, Mr. Strassberger, for the benefit of the jury? A. Practically 600 feet.

Q. In other words, there is so far as you know 600 feet of unexcavated area between the area you

(Testimony of Edgar J. Strassberger.)

have just mentioned and the surface of the Poague property?

A. 600 feet of vertical area, yes.

Q. What is the composition of the material in that intervening space, Mr. Strassberger?

A. I imagine it's granite. I was unable or never able to see it vertically above, but it's a granite formation.

Q. Mr. Strassberger, concerning plaintiff's exhibits 21 to 26 there was one you testified to on direct examination as having disclosed an area of subsidence at the time of the photograph which has changed considerably for the worse since the picture was taken. Will you identify it?

A. That was the octagonal sets on the 300. [219]

Q. And the area as shown in plaintiff's Exhibit No. 14? A. That's correct.

Q. And that photograph was taken when?

A. I think in 1943.

Q. I think it's 21 to 26?

A. This is Exhibit No. 14. Is that right?

Mr. Maury: That's an exhibit with another marking.

Mr. Genzberger: No. 25 I think you will find it.

Mr. Finlen: Plaintiff's Exhibit No. 25. Plaintiff's Exhibit 25 is the marking in this case.

Mr. Maury: That's right.

A. That was taken—well, that must have been taken in 1943 or 1944 because it was in splendid shape.

Mr. Maury: Just a moment. It was taken in

(Testimony of Edgar J. Strassberger.)

1943 or 1944 and I don't think Mr. Finlen or ourselves either care for you to go any further with that answer.

Q. (By Mr. Finlen): When, subsequently, did you visit that area?

A. I believe in 1945 during the Ammerman trial.

Q. In 1945? At any other time subsequently?

A. In 1946. The last, the 28th of March in 1947.

Q. And the area depicted is on what level or what sill?

A. The 300 I believe. Let me look at that picture again. The 300 sill yes, sir.

Q. And the area has changed or did change substantially between the time of the taking of the picture and the time of your subsequent visit?

A. Yes, sir.

Q. Who accompanied you, Mr. Strassberger, at the time [220] that picture was taken?

A. I think Mr. Spiegel and Mr. Strandberg.

Q. And who accompanied you the time you made your subsequent visits to the area depicted?

A. Mr. Strandberg.

Q. You testified, Mr. Strassberger, that subsidence of the earth causes leaks, telescoping, and water and gas pipes to be thrown out of line in the area of the Poague property?

A. That would be the result of movement of the ground; yes, sir.

Q. You mean by that that such subsidence could account for such leaks or cause such leaks, or do you mean that it did?

(Testimony of Edgar J. Strassberger.)

A. I mean that a greater majority of those leaks were caused by subsidence. Some probably could be old pipe.

Q. The greater majority of what leaks?

A. The leaks to the water pipe in that district.

Q. You mean all of them or only the ones you specifically testified as having observed?

A. Well, just from general knowledge and ground moving I would say a large percentage of it was due to ground movement.

Q. Did you visit or see all the leaks?

A. I seen a good many of them.

Q. Answer my question, please?

A. Probably not; not all of them. I think there was 136 in a certain area there. I didn't observe all of them.

Q. Are you talking about Mr. Plummer's testimony? A. Yes, sir. [221]

Q. Are you familiar with the leak on Placer south of Platinum? A. No.

Q. Concerning which Mr. Plummer testified giving the date of January 29th, 1940?

A. No, sir.

Q. Do you know the cause of that leak?

A. No.

Q. The same question with reference to the leak reported February 12th, 1940, on the Platinum street intersection on Idaho?

A. Platinum and Idaho? I don't recall that; what date was that?

Q. February 12th, 1940.

(Testimony of Edgar J. Strassberger.)

A. No. I wouldn't be able to recall anything prior to 1944.

Q. 1944? But you do recall leaks in 1944?

A. I never kept any special record of that. I can't testify offhand to a particular date or condition of the pipes.

Q. But you testified here that all of those leaks with the exception of the first two that I specifically mentioned were caused by subsidence?

Mr. Maury: We object as that is not the witness' testimony.

Mr. Finlen: I am asking him if it didn't.

Mr. Maury: No, you are saying he did. We object to that and that is an unfair statement in the presence of the jury, improper cross-examination; and assuming something the witness has not testified to at all. The [222] witness said that subsidence has caused telescoping and pulling and settling, and leaks in water mains when in service; and he did not name any particular leak and your statement is an unfair statement of the record.

Mr. Finlen: I submit the record; it is not in the least unfair.

Mr. Maury: We will submit the record.

The Court: As I recall it the witness testified—he gave his opinion as to the effect the subsidence on the ground would have on water pipes and gas pipes. He further testified that he knew of some instances of leaks and further testified as I recall that in his opinion the great majority of the leaks that has been testified to by Mr. Plummer were

(Testimony of Edgar J. Strassberger.)

caused by the subsidence of the ground. However, ladies and gentlemen, that's my recollection of the testimony but, of course, you are the judges as to what the testimony is and you have your own recollection of it and if you have any different recollection of the testimony than that I have just given as my recollection of course it's your duty to follow your own recollection of the testimony. Proceed.

Q. Now, Mr. Strassberger, you said you wouldn't have any knowledge of leaks prior to 1944. Is that correct?

A. That's correct unless there was some specific time I was there and made some note of it. I can't recall any definite dates; it's too hard; it's too distant.

Q. You lived in that neighborhood for how long?

A. Longer than that.

Q. Well, can you recall any leaks in 1944?

A. If I would specify any particular leak on any [223] particular date I would be guessing, but I can specify positions and see where the men were working and if you want me to take the time I will compile a list I did see and the dates I saw.

Q. I will ask you this question, Mr. Strassberger. Did you examine any leaking or leaky or otherwise damaged water or gas pipes prior to November, 1945, in the so-called subsidence area?

A. Yes, I observed them but I couldn't tell you definitely which one without looking up my records.

Q. But you have examined some pipes?

(Testimony of Edgar J. Strassberger.)

A. I have examined diggings where the Water Company has had pumps pumping out the water and I have visited positions where the water flooded through the excavations and down the street.

Q. Did you examine the pipe? A. No, sir.

Q. You never had any cause?

A. No, I never got down into the ditch.

Q. Then you didn't examine the leak if you didn't examine the pipe?

A. I could see the leaks.

Q. In the pipes?

A. Presumed to come from the pipes.

Q. I am asking you whether or not you know, not what you presume?

A. Well, am I permitted to give a particular instance to answer the question?

Q. I am asking you just for any particular instance prior to November, 1945, where you examined the underground [224] pipe at the site of any leak, and I am directing your attention to either gas pipes or water pipes?

A. I believe I can. I believe at the corner of Porphyry and Dakota which is just north of Mrs. Poague the Water Company had the ditch opened and a good sized pipe,—I don't remember the diameter, maybe ten inches,—and they had a piece of pipe cut about two feet long that they were replacing a broken joint or something of that nature.

Q. Replacing a broken joint or something of that nature?

(Testimony of Edgar J. Strassberger.)

A. Yes, sir; there was a leak there.

Q. Did you examine the leaky pipe?

A. No, I didn't. I looked at it.

Q. I am asking you, Mr. Strassberger if you can give any instance where you examined the pipe prior to November of 1945 where there was a leak and which pipe was either a gas or a water pipe?

A. Well I can't say I examined the pipe. I saw it but I didn't make an special examination of it. I probably don't understand your question. Do you mean to see whether it was split or worn out or twisted?

Q. Yes, to observe the condition there?

A. I never made any close examination of any pipe.

Q. To tell whether it was worn out?

A. No, I believe a certain number was worn out and certain ones twisted.

Q. Which ones do you believe were twisted?

A. The ones subjected to ground movement.

Q. Which ones were subjected to ground movement?

A. All of them in the subsidence area are subjected to [225] ground movement.

Q. All right then, let's start in 1944, Mr. Strassberger. That's as far back as your knowledge goes?

A. I have no way of coupling up the dates unless I go through my records.

Q. Where do you have your records?

A. I may have some of them here. It will be

(Testimony of Edgar J. Strassberger.)

kind of hard. There are several thousand of those records I have taken over a period of some four years.

Q. Mr. Strassberger, while you are looking will you just answer one question and maybe we will be able to shorten it considerable. Isn't it your position that you believe that subsidence could cause leaks in pipes, in underground pipes?

A. Both could and did.

Q. That's where we differ. We want to find out where it did?

A. I will tell you one place where it did.

Q. Get your records.

A. I can remember that one.

Q. So you can clarify my information.

Mr. Maury: Answer the question as to one place.

The Court: There hasn't been any question put him. Counsel hasn't put the question.

A. Well, I got several thousand records here and it's going to take some time to compile that but I can do it.

Mr. Genzberger: You don't have to get but one.

A. Yes, but they are scattered around.

The Court: If counsel seems to think it's necessary.

Mr. Maury: May I refresh his memory, Mr. Finlen, as [226] to one date?

The Court: I don't think so, Mr. Maury. Mr. Finlen has the witness under examination and we will permit him to go ahead, and if it takes time we will simply have to take time.

(Testimony of Edgar J. Strassberger.)

Mr. Finlen: I don't wish to take any more time than anybody else does, Your Honor, but I believe it's necessary.

The Court: I think, ladies and gentlemen, Mr. Strassberger can examine those records just as well without our presence so we will take a recess for twenty minutes to permit him to gather what data you can.

(Recess for 20 minutes.)

The Court: Proceed.

Q. (By Mr. Finlen): Mr. Strassberger, I believe you testified that in your opinion the majority of the water pipe and gas pipe disturbances testified to by the witnesses Plummer and Doran were caused by subsidence. Is that correct?

A. I didn't hear Mr. Doran's testimony, but the water pipes I heard I believe that the majority of those leaks were caused by subsidence. That's right.

Q. Directing your attention to the water pipe leaks what is your opinion regarding the leak reported on January 15th, 1944, on Idaho street south of Platinum?

A. I observed a leak there. The Water Company excavated a trench and the water came up to the surface and ran all over the street, a regular stream of water for quite a little while, an hour or so; I just saw it going down and that was close to the west line of Idaho. Sometime [227] later there was another break just—(interrupted).

Q. Just a minute. Confine your remarks to this one.

A. I don't know by dates.

(Testimony of Edgar J. Strassberger.)

Q. And did you observe the pipe at that time?

A. I couldn't see the pipe; the trench was full of water.

Q. You don't know the nature of the leak then?

A. No.

Q. Do you know the nature of the repair?

A. No, I didn't stay there to watch them repair it.

Q. Do you know what was leaking?

A. Water.

Q. From what? A. From a main.

Q. Do you know the nature of the leak?

A. No.

Q. Do you purport to know the cause then?

A. It was right at where the escarpment, where the Zaroma Lode crosses Porphyry street at Idaho.

Q. Will you answer my question, please?

A. It was the ground movement in my opinion.

Q. Describe what happened with reference to whether the pipe was merely worn and leaking or had been pulled or telescoped?

A. That particular place was covered with water and I couldn't see it.

Q. You don't know whether it was caused from a hole in the pipe caused by corrosion or not?

A. No, I don't.

Q. If it was due to a hole in the pipe caused by corrosion [228] would you say that was due to ground movement?

A. I would call that electrolysis.

(Testimony of Edgar J. Strassberger.)

Q. Would electrolysis causing a leak in the pipe be due to ground movement?

A. No, electrolysis wouldn't necessarily have anything to do with ground movement.

Q. Then you don't know the cause of this particular leak do you Mr. Strassberger?

A. Not from actually examining the pipe but from the position of the pipe and ground movement I would attribute it to ground movement.

Q. What was the position of the pipe to any other object? A. Any other object?

Q. Yes?

A. It was just off from the north curblin on Porphyry street.

Q. Did you see the pipe?

A. No, I didn't see the pipe.

Q. How do you know the position of the pipe?

A. I don't know the position of the pipe.

Q. You don't know the cause of the leak do you?

A. Only from what I testified.

Q. Well do you know the cause?

The Court: I think he said on a number of occasions he doesn't. That his opinion was it was caused by ground movement.

Mr. Finlen: He also testified that it may have been caused by electrolysis which wouldn't necessarily be due to ground movement. [229]

The Court: He said if it was electrolysis ground movement would have nothing to do with it, but he said he didn't see the pipe and doesn't know the nature of the pipe or the leak.

(Testimony of Edgar J. Strassberger.)

Q. You don't know whether the cause of that leak was electrolysis or some other cause?

A. I don't know whether it was electrolysis, but I believe it was ground movement.

Q. Why do you believe it was ground movement?

A. Because there is considerable movement at that place.

Q. You didn't see the pipe and don't know anything concerning the nature of the leak?

A. Just from general observation and knowledge of the district and what happens with pipes in the subsidence zone. That's more likely to be due to subsidence than further away because it's right at the escarpment right where the ground splits and drops.

Q. I am not asking you what is the possible cause or what is likely, I am asking you what is the cause of that leak?

The Court: He said no. He said in his opinion it was caused by ground movement. In other words, he is testifying about a matter of opinion and not to a matter of fact.

Q. With regard to the leak reported on February 10th, 1944, on Porphyry street west of Colorado?

Mr. Genzberger: Mr. Finlan, what was the previous one you asked him about?

Mr. Finlan: The previous one was on January 15, 1944. [230]

Mr. Genzberger: I think he was testifying to one a block and one-half north of that place.

The Court: The witness is giving his testimony.

(Testimony of Edgar J. Strassberger.)

Mr. Genzberger: A misunderstanding between the places.

The Court: The witness hasn't said so and neither has other counsel, so we will just pass that.

Q. Are you familiar with that leak?

A. No, I can't recall it at the present time.

Q. And the leak reported on March 1st, 1944, at Placer street south of Platinum. Are you familiar with that leak?

A. Placer south of Platinum. I can't recall it.

Q. And the leak reported on Idaho north of Platinum?

A. I believe that's one repaired by Mr. Sundberg the plumber.

Q. What was the nature of the leak if you observed it?

A. I have to give the same answer there as to all the others. I didn't get down and look at the leak.

Q. You didn't see the pipe?

A. I don't believe I saw the pipe, no.

Q. Are you familiar with the leak reported on April 14th, 1944, on Main street north of Aluminum? A. No.

Q. The leak reported on April 28th, 1944, Placer street north of Aluminum?

A. Placer street? I seen some repair work going on there but I can't tell you anything definite about it.

Q. You don't know what was wrong with the pipe that caused the leak?

(Testimony of Edgar J. Strassberger.)

A. I just saw them repairing it. [231]

Q. Are you familiar with the leak reported July 30th, 1944, on Colorado and Porphyry street?

A. Colorado and Porphyry. No, that's in the subsidence zone but I don't remember that particular opening.

Q. Are you familiar with the leak reported September 28th, 1944, on Main street north of Silver?

A. No, I don't believe I saw that one.

Q. And the leak reported December 8th, 1944, on Montana street north of Porphyry?

A. There is several times I observed them repairing the pipes there. That's between Porphyry and Silver.

Q. Did you observe a repair being made there on December 18th, 1944?

A. There could have but I can't remember about the date. I have seen them repair pipes there.

Q. But you don't recall having observed the repair of a pipe at that location on that date?

A. No, only that I saw them working; that's all.

Q. Are you familiar with the leak reported on January 17th, 1945, on Montana street south of Silver?

A. Montana street south of what?

Q. Silver?

A. Well that's the same location. Yes, I seen them working in there; several trucks and a compressor.

Q. Did you see the pipe?

Q. Then you don't know the nature of the leak?

A. No, sir.

A. I don't recall the pipe.

(Testimony of Edgar J. Strassberger.)

Q. And the leak reported on January 27th, 1945, on Dakota street north of Aluminum. Are you familiar with [232] that leak?

A. Not of the leak itself, no.

Q. And a leak reported February 3rd, 1945, on Placer street north of Aluminum?

A. I didn't get your street.

Q. Placer street north of Aluminum?

A. Placer street north of Aluminum. Yes, I saw them working in there. That's not far from that explosion we talked about a minute ago. I saw them working there.

Q. Did you see the pipe? A. No.

Q. Are you familiar with the nature of the leak?

A. No.

Q. Are you familiar with the leak on February 9, 1945, on Colorado street south of Gold?

A. No, not specifically.

Q. Are you familiar with the leak on February 10th, 1945, on Montana street north of Aluminum?

A. Yes.

Q. Did you see the pipe?

A. I saw them working there for several days. It was quite an excavation but I did not see the pipe.

Q. Then you don't know the nature of the leak of the pipe?

A. No, I can't tell you the nature of the leak.

Q. Are you familiar with the leak on February 17th, 1945, on Dakota street north of Aluminum?

A. I don't recall that one.

(Testimony of Edgar J. Strassberger.)

Q. Are you familiar with the leak reported on February 24th, 1945, on Colorado street south of Platinum? [233] A. I don't recall it.

Q. Are you familiar with the leak on March 20th, 1945, Montana street south of Platinum?

A. That was another time at the same place I just spoke of.

Q. Did you see the pipe?

A. I didn't see the pipe.

Q. I take it then you don't know the nature of the leak; only it was a leak?

A. What do you mean by the nature of the leak?

Q. Well, the pipe was leaking because it had a hole in it, or some other cause?

A. I presume if it had a hole in it it would leak.

Q. Well, what I mean, Mr. Strassberger, a hole other than the hole manufacutred in the pipe at the joint?

A. I understand that. I mean the same thing. There wouldn't be a leak unless there was a hole in it or a crack or the joint pulling.

Q. Was it pulled apart? A. I don't know.

Q. You don't know whether it was pushed together or telescoped?

A. No, I don't know whether the ground was shoving down or pulling.

Mr. Finlen: We ask the answer be stricken as not responsive to the question.

Mr. Genzberger: We resist the motion.

The Court: The motion is granted.

Q. You don't know anything about the position

(Testimony of Edgar J. Strassberger.)

of one length of the pipe with reference to the other? [234] A. I didn't see it.

Q. Are you familiar with the leak March 28th, 1945, on Dakota street south of Porphyry?

A. I don't remember that.

Q. Or the leak on March 28th, 1945 on Porphyry west of Idaho.

A. That's probably the second one I tried to tell you about a little while ago where the water ran down the street so heavily.

Q. Did you see the pipe?

A. No, I couldn't see the pipe. The ditch was full of water.

Q. The leak reported on April 9th, 1945, on Aluminum street east of Montana, are you familiar with that?

A. I know the district and I know they were working in there but I can't give you any information as to the nature of the leak.

Q. And the same with reference to the leak of April 9, 1945, on Placer north of Aluminum?

A. I have seen them work there, that's all.

Q. You didn't see the pipe? A. No.

Q. And what with reference to the leak on April 16th, 1945, on Idaho south of Platinum?

A. Just that I recall them working there.

Q. You don't know what they were working on?

A. Working on a pipe.

Q. Did you see the pipe?

A. I don't recall of seeing the pipe at that point.

(Testimony of Edgar J. Strassberger.)

Q. June 30th, 1945, on Porphyry street west of Dakota? [235] A. What date was that?

Q. June 30th, 1945?

A. I don't recall the particular.

Q. July 27th, 1945, Colorado south of Gold?

A. I don't recall that one.

Q. August 9th, 1945, Idaho north of Gold?

A. I remember of some work, repair work going on there.

Q. Did you see the pipe? A. No.

Q. On August 29th, 1945, Platinum west of Montana?

A. Platinum west of Montana? I don't remember it.

Q. August 30th, 1945, Idaho north of Platinum?

A. I believe I got something on that. No, I don't remember that.

Q. September 7th, 1945?

A. Just a moment. On April 30th, 1945.

Q. I directed your attention to August 30th, 1945.

A. No. I have one on April 30th, 1945. I don't remember that one either.

Q. On September 7th, 1945, in front of 626 South Montana street?

A. I can't tell you anything about it.

Q. September 9th, 1945 on Porphyry street at the intersection with Idaho?

A. That's the same spot where they had been opened three or four times. I never saw the pipe.

Q. On September 16th, 1945, Placer street south of Platinum?

(Testimony of Edgar J. Strassberger.)

A. No, I can't recall that.

Q. October 5th, 1945, Dakota south of Mercury?

A. I don't remember it.

Q. October 9th, 1945, Dakota south of Porphyry?

A. No, I don't recall that particular incident.

Q. November 8th, 1945, Aluminum east of Montana?

A. Yes, that's close to Placer street. I saw them working there.

Q. Did you see the pipe?

A. No, sir; I didn't.

Q. Do you know anything about the nature of the leak? A. No.

Q. November 9th, 1945, Platinum street at the intersection of Idaho?

A. No, I don't remember that one.

Q. November 10th, 1945, Platinum at the intersection of Idaho?

A. No, I don't recall that one.

Q. November 15th, 1945, Platinum east of Idaho? A. No.

Q. November 16th, 1945, Dakota north of Aluminum? A. No, I don't remember it.

Q. November 26th, 1945, Colorado south of Porphyry?

A. No, I don't remember that one either.

Q. December 8th, 1945, Montana north of Porphyry?

A. Well, there has been several in there.

Q. Do you remember that particularly?

(Testimony of Edgar J. Strassberger.)

A. Well, only in a general way; they were repairing broken pipes in there.

Q. Did you see the pipe?

A. I didn't see the pipe, no.

Q. How do you know they were repairing broken pipes, Mr. [237] Strassberger?

A. Well, the repair crew was there working and had the ground torn up and had material there that indicated that they were repairing the pipe.

Q. Indicated they were equipped to repair the pipe, is that right?

A. They were equipped, yes.

Q. What about the leak January 21st, 1946, Platinum west of Montana?

A. That's close as I recall the repair work made by Perry the plumber in which he explained to me that——(interrupted).

Q. Which he what? A. Explained.

Q. We don't care for his hearsay, Mr. Strassberger. Did you see the leak or were you familiar with it or know anything about it of your own knowledge? A. What's the date?

Q. January 21st, 1946? A. No.

Q. January 21st, 1946, on Main street at the intersection of Platinum? A. No.

Q. February 3rd, 1946, on Montana north of Aluminum?

A. Well, that's the same location. I have seen them work there several times.

Q. On April 8th, 1946, Placer north of Aluminum? A. Where? [238]

Q. You never saw the pipe? A. No, sir.

(Testimony of Edgar J. Strassberger.)

A. Placer north of Aluminum street?

A. I don't recall that particular one. There was some work done there but I don't know the dates.

Q. May 26th, 1946, on Platinum at the intersection of Colorado?

A. No, I don't recall that one.

Q. April 5th, 1946, Platinum west of Montana?

A. No, I don't remember that one.

Q. October 9th, 1946, Dakota north of Aluminum?

A. There may have been one there but I don't recall it.

Q. November 2nd, 1946, Montana and Aluminum?

A. That's the same location where they been doing a good deal of work there repairing.

Q. Do you recall that particularly?

A. No, I don't.

Q. November 3rd, 1946, Main and Platinum?

A. No.

Q. Idaho north of Gold on December 7th, 1946?

A. I recall them working there but I didn't see the pipe.

Q. Do you know they were working on pipe?

A. Well, they were opening a ditch there and my recollection it was the Water Company.

Q. They might have been taking a valve off for all you know? A. They might have been.

Q. The leak on January 8th, 1947, Placer north of Aluminum? A. No, I don't remember it.

Q. January 9th, 1947, Colorado south of Platinum? [239] A. I don't recall it.

(Testimony of Edgar J. Strassberger.)

Q. January 25th, 1947, Dakota north of Aluminum?
A. I don't recall it.

Q. February 6th, 1947, Montana north of Aluminum?

A. Well, that's down that same district I seen them working several times. They had quite an excavation down there.

Q. You don't know what the nature of the work was?
A. No.

Q. March 12th, 1947, Dakota north of Aluminum?
A. I don't remember that one.

Q. Now, referring to gas leaks, Mr. Strassberger, were you familiar with any gas leaks prior to 1944?

A. Not that I can specifically recall. I may have some notes of it in my records but I can't recall any at this time.

Q. Would it help you if I would cite the specific instances, locations and dates prior to 1944?

A. Well, if it's a question that requires a personal examination of the pipe itself to determine the kind of a leak I wouldn't be able to qualify.

Q. Well, would it require merely observation of the pipe?
A. What's that?

Q. Merely observation of the pipe. Did you observe any gas pipe prior to 1944?

A. If I knew the date of when I testified to that explosion I could; I probably could.

Q. We will come to that later then, Mr. Strassberger.
A. I think I got it right here. [240]

Q. With the exclusion of the Placer street leak concerning which you testified are you familiar with

(Testimony of Edgar J. Strassberger.)

any leaks that occurred prior to 1944, excepting that one for the moment?

A. No, I never paid any special attention to the leaks. There had been several explosions but outside of ordinary leaks I paid no attention to it.

Q. Are you familiar with the gas leak on February 22nd, 1944, at Platinum and Dakota?

A. No, I don't remember it.

Mr. Maury: Did you say February 22nd?

Mr. Finlen: February 22nd, 1944, testified to by Mr. Doran.

Mr. Maury: It wasn't Platinum?

Mr. Finlen: Platinum and Dakota.

A. 112 West Platinum.

Q. That is Platinum and Dakota street?

A. Well, that's pretty close to it.

Q. This was 112 West Platinum street?

A. That's right, 112 West Platinum. There was an explosion there and I examined the pipes and saw them underground and saw them working there; the Montana Power Company was working there and repairing that gas pipe.

Q. What was the nature of the—describe the pipe repairs?

A. Well, I can't do that. There were men working on the repairs very frantically and they had the gas turned off when I happened to be there with Mr. Maury, and we both looked down and saw the pipe; but the extent of damage I can't tell you what it was. [241]

Q. Would you tell the nature of the damage to the pipe?

(Testimony of Edgar J. Strassberger.)

A. Well, it was a leaky pipe; it was leaking gas.

Q. Leaking gas at the point or through a hole in the pipe?

A. I can't tell you that. I wasn't a repair man and didn't do any repair on it and didn't stay there long enough.

Q. Did you stay there long enough to see if it was leaking at the joint or elsewhere?

A. No, sir; I didn't.

Q. Do you know what the size of the pipe was?

A. It looked to me about a four or six inch pipe. I couldn't swear exactly; in the neighborhood of a six inch pipe.

Q. In any event that's the leak at 112 West Platinum?

A. Yes, sir.

Q. Are you familiar with the gas leak on January 17, 1947, reported at 413-415 South Montana?

A. No, sir.

Q. And the leak on December 20th, 1944, at 316 South Idaho?

A. 316. At what date?

Q. December 20th, 1944?

A. No, I don't remember that.

Q. And the leak on June 9th, 1945, at 220 West Mercury?

A. No, I paid no attention to that.

Q. Now you testified specifically in answer to Mr. Maury's questions regarding the leak at Idaho and Porphyry?

A. The leak at Idaho and Porphyry; yes, sir.

Q. When did you observe that leak?

A. I can't give you the date.

(Testimony of Edgar J. Strassberger.)

Q. Was it a water leak? A. Yes.

Q. What year?

A. Well, it happened two or three times there within the last two years.

Q. Did you see the pipe?

A. The ditch was full of water; I couldn't see it. The ground was all full of water and was flooded running down Porphyry and then down Idaho street.

Q. You don't know the nature of the leak then?

A. No.

Q. You also testified in answer to Mr. Maury's interrogation regarding a gas leak on Placer street near the Nelson property?

A. I testified it was close to the subsidence north of Nelson's property.

Q. I believe the adjoining property you said?

A. I think so. I think the explosion was adjoining to the north.

Q. What was the nature of that leak?

A. That explosion?

Q. No, the leak in the pipe?

A. I just testified we saw them working on it and I don't know the nature of the opening, whether it was a hole through the pipe or what it was; or a crack in the pipe.

Q. Was the condition of the pipe you saw being repaired due to the explosion? [243]

A. I don't think so. I think the explosion was due to the leaking of the pipe.

Q. Describe the pipe?

(Testimony of Edgar J. Strassberger.)

A. Well, I paid no special attention. I said a minute ago I thought around four or six inch but I am not certain. I didn't measure it.

Q. Do you know where the leak was; whether at the joint or elsewhere?

A. No, I didn't pay any attention to that.

Q. You don't know whether it was caused from a hole in the pipe or pulling apart of the pipe from the joint?

A. No.

Q. Coming back, Mr. Strassberger, to the matter of these elevations. Did you at the recess send for your records regarding elevations?

A. No, I was looking up these other records you asked for.

Q. Well, maybe we can get along without your records. Did you verify any street elevations when you were City Engineer of the City of Butte in the area between Wyoming street on the east and Galena street on the north and Platinum street on the south and Jackson street on the west?

A. I ran a set of levels over taking the bench marks as given in the ordinances, the City Ordinances, and ran a set of levels over an area in there.

Q. Did you verify elevations then?

A. I checked them, yes.

Q. I will ask you whether or not on the trial of the case of Robert E. Ammerman vs. Butte Copper & Zinc Co. [244] et al. tried in this court in November, 1945, when you testified as a witness whether or not you were asked the same question, "Did you verify any street elevations when you

(Testimony of Edgar J. Strassberger.)

were City Engineer in the area between Wyoming street on the east and Galena street on the north, Platinum street on the south and Jackson street on the west," and whether or not you did not reply, "Well, I can't remember whether I did or not"?

A. I can explain that.

Q. I am asking you whether or not you were asked such a question and gave such a reply?

Mr. Maury: The witness should be shown the record.

A. I understand that.

The Court: Just a minute. Show the witness the record. (Counsel shows witness record.)

A. I probably gave that answer. May I explain it.

The Court: Yes.

A. Mr. Finlen is asking technical questions I been dealing with for forty-five years and his question does not mean anything to me or any other engineer unless said engineer was given a definition of what the attorney means by "did you verify." Now you can carry in a set of levels from the Pacific ocean by precise levels and get them into Butte. Now there has been two or three such sets. The A.C.M. is using one set, the City of Butte is using one set, and Strassberger is trying to reconcile the other sets. Now the idea of asking an engineer if he verified is ambiguous and not at all understanding to me. When I answered that question that way it was the best I could answer and today I tried to give you an [245] answer by skimming over this

(Testimony of Edgar J. Strassberger.)

explanation "Did I verify it." Where do you want me to go and verify it?

Q. In this court a few moments ago you answered that question in the affirmative did you not?

A. I tried to give you a sensible answer.

Q. In the same court at the trial of the Ammerman case you answered that same question in the negative did you not?

A. It could be answered both in the negative and affirmative.

The Court: Strike the answer as not responsive to the question.

A. I don't understand him and he don't understand me.

The Court: That question is perfectly intelligible. He is asking you what you did today and sometime in the past.

A. If I said no, which I evidently did—— (interrupted).

The Court: As I recall it you didn't say no. From the answer you said you didn't remember. That seems to be the answer of the question given at the former trial. Is that correct, Mr. Finlen?

Mr. Finlen: The answer reads "I can't remember whether I did or not." (Page 419.)

Q. (By Mr. Finlen): Well, Mr. Strassberger, you testified you as City Engineer used a certain plat during sometime between 1920 and 1922, both years inclusive, and that that plat showed certain elevations. Is that correct?

A. I don't remember.

(Testimony of Edgar J. Strassberger.)

Q. You don't remember whether the plat did show any elevations or not? [246]

A. I don't remember what plat you refer to.

The Court: Read that question to me Mr. Reporter.

(Reporter reads question.)

Answer that yes or no, if you gave that testimony in this case?

A. I probably did; I don't remember.

The Court: Very well, proceed.

Q. (By Mr. Finlen): Whether you gave the testimony or not, Mr. Strassberger, I will ask you now whether as City Engineer during the period from and including 1920 to and including 1922 you had occasion to refer to a plat showing an area in the neighborhood of the Poague residence which also gave the elevations?

A. The only plat I can recall would be sewer profiles along that street for reference, or the ordinance; and they both would be the same. If I referred to the ordinances or a profile map I would get the elevation of a certain street corner and I used that official elevation to run my levels over the rest of the area and I would check on other street corners as I went along, and that's what I thought you meant by verifying.

Q. Well now, you did use a certain ordinance or plat or map that gave elevations?

A. Yes, sir.

Q. Did you verify, actually yourself verify or take the elevations shown upon that plat or map or

(Testimony of Edgar J. Strassberger.)

ordinance to determine whether or not the elevations as given thereon were correct?

A. Relatively.

Q. Relatively? [247]

A. Yes.

The Court: Strike the answer. That's not responsive to the question.

Mr. Maury: We except to that.

The Court: Exception is granted. The question as I understand it calls for a yes or no answer. He asked whether he did or did not check.

Mr. Maury: I think the court should judicially note that nobody has verified an elevation here for fifty years from seacoast up.

The Court: The court does not judicially know that. It may have been done many, many times.

Mr. Finlen: We want an explanation about that because he testified he has verified it.

(Question repeated.)

The Court: That answer is ordered stricken.

A. May I explain what I did.

Mr. Finlen: You may say whether you did or did not do as I asked.

The Court: If you don't understand the question you may so state.

Mr. Genzberger: We object to the question as complex.

The Court: Objection overruled. If the witness does not understand the question, he can so state.

A. I don't understand the question.

(Testimony of Edgar J. Strassberger.)

The Court: What is there about the question you don't understand?

A. Your Honor, to verify an elevation,—the elevations are given above sea level and even when they start out at sea level they assume a certain elevation. That's carried into Butte and the City of Butte has adopted a certain [248] elevation for the corner of these streets. I assumed that's right and I adopted the elevations as given in the ordinances and I used those elevations as the starting point and checked all the other elevations in that area, but to verify I can't understand how any engineer——

Q. As a matter of fact from your testimony you actually never verified the elevation?

A. No, I never did.

Q. That's all Mr. Finlen been asking you whether you did or didn't?

A. I checked the relative elevations of all those corners from the bench mark I assumed as correct.

Q. (By Mr. Finlen): Did you make any determination yourself that the elevations as shown on that plat, map or ordinance were correct?

A. No, I assumed them to be correct.

Q. Now you state that since you were City Engineer you have actually determined that some of the elevations shown on that map, plat or ordinance have changed? A. That's correct.

Q. Where did you make any such determination?

A. All the way—— (interrupted).

(Testimony of Edgar J. Strassberger.)

Q. Within the area, Mr. Strassberger, bounded by Wyoming, Galena, Platinum and Jackson?

A. As I can recall without looking at my notes I went as far west as Washington, as far east as Colorado and north to Silver and south to Gold. That's my present recollection. I ran levels in that area on all the [249] street corners, block corners, including alleys where they came into the street lines.

Q. What elevation in that area shown on the map, plat or ordinance that you referred to as City Engineer did you determine subsequently to have changed?

A. Will you please read that to me?

(Question repeated.)

A. The survey showed that considerable corners changed from the official records of those corners.

Q. What corners?

A. I would have to refer to my notes.

Q. Are you able to state any elevation that's changed? A. No, not offhand.

Q. Are you able to state any corner where you found a bench mark?

A. I assumed a bench mark at the southeast corner of Idaho and Silver and ran several other corners to check it and when several corners gave approximately the same proper official elevation I assumed that as the elevation to work on. Then it became relative between the rest of the elevations, the rest of the official elevations and the actual elevations I found.

(Testimony of Edgar J. Strassberger.)

Q. Did you find a bench mark at the southeast corner of Idaho and Silver streets?

A. I took the surface of the sidewalk at the corner.

Q. Did you determine the elevation there?

A. I assumed it as given in the ordinance.

Q. What elevation was given at the sidewalk at the corner?

A. I would have to look at the ordinance.

Q. Subsequently to looking at the ordinance did you [250] determine the elevation at that point?

A. No, I assumed it; I took it from the ordinance.

Q. Did there not come a time when you determined the elevation had changed?

A. For instance, if the elevation at that corner was 555 and the next two or three blocks north and south or north and west gave the same relative elevation as the official, then I assumed that 555 at that corner was correct, and then I used that as my bench mark and went through the rest of the area.

Q. Did you ever actually determine, Mr. Strassberger, that the elevation assumed by you at the southeast corner of Idaho and Silver street had changed?

A. It hadn't changed subsequently, three or four months. I used that elevation three or four times but what it is today I don't know.

Q. Was that sidewalk to which you have referred at the southeast corner of Idaho and Silver installed

(Testimony of Edgar J. Strassberger.)

when the plat or map or ordinance that you referred to was made or passed?

A. I wouldn't be able to tell but the City Engineer at the time should have used the same elevations I did to build a sidewalk to grade.

Q. Do you know whether they did or not?

A. No.

Q. Can you tell me of any change in elevations during any period at any point in the neighborhood of the Poague property and if so, inform us what the change was?

A. Well, my map of that district will show the elevations as I found them to be by actual survey, but you can [251] go down on Dakota and Porphyry, the south side of Porphyry, and look at the sidewalk there and without an instrument you can see a big change.

Q. I am asking you if you, as an Engineer, determined any change, and if so what the extent of the change was?

A. I ran levels over like I did a few years ago.

Q. Where, at what point?

A. All the block corners within the area I described a few moments ago.

Q. Have changed?

A. A good many of them have changed. I would have to look up the records to tell you the amount of inches.

Q. Could you tell us one particular block corner that has changed, and if so the extent of the change?

(Testimony of Edgar J. Strassberger.)

A. Well, if I am permitted to guess.

Mr. Maury: Get your records.

Q. I am not asking you to guess?

A. I can't interpret records without looking at them.

Q. I am asking you if without looking at your office records you could tell us of any change?

The Court: I think the witness testified several times he has records and that he is unable to answer your question without reference to his records, so I think we better pass that for the time.

Mr. Finlen: In the interest of time we will forego the record and turn the witness over.

Redirect Examination

By Mr. Maury:

Q. Mr. Strassberger, did you assume that Mr. Plummer, when on the witness stand, was telling the truth from his records? [252]

Mr. Finlen: Just a minute. We object to that,——

The Court: Sustained.

Mr. Maury: This is the witness that has testified as to his opinion.

The Court: Counsel desires to make an objection.

Mr. Finlen: Objected to on the grounds and for the reason it calls for a conclusion of the witness; upon the further ground and further reason it invades the province of this jury.

The Court: Sustained. The law presumes the witness did tell the truth when he went on the stand.

(Testimony of Edgar J. Strassberger.)

Q. And when you said that you believed that the majority of these breaks in the water mains there were due to subsidence, had you heard the testimony of Mr. Plummer? A. Yes, sir.

Q. And had you heard the nature of that testimony? A. Yes, sir.

Q. As to which of the breaks were telescopes, which of the breaks were pulls? A. Yes, sir.

Q. And which were leaking?

A. Yes, sir; that's right.

Q. And was your opinion based in any way on that testimony? A. Entirely.

Q. Entirely on that testimony. And you heard him reading from records that had been made in the ordinary course of business of the Water Company? A. Yes, sir.

Q. And was your opinion based on those records?

A. That's right.

Q. Now you have been asked as to certain breaks. Have you observed breaks in water mains immediately south of an escarpment? A. Yes, sir.

Q. And what escarpment?

A. The Zaroma-Emma.

Q. Where does that escarpment start on the east as far as you know? A. On the east?

Q. Yes, as far as you have observed?

A. Well, close to the Emma shaft; probably a little east of the Emma shaft.

Q. Have you observed that escarpment in the Synagogue, the Jewish church? A. Yes, sir.

Q. Near the Reynolds & McDowell building?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. Where does that escarpment run going westerly?

Mr. Finlen: Objected to as improper redirect examination; repetitious.

Mr. Maury: We want to connect that with these breaks.

The Court: It may be improper redirect examination and if it is I will permit the counsel to reopen direct examination. The objection is overruled.

Q. Have you the question in mind?

(Question repeated.)

A. I think he wants to know the direction west of the Jewish synagogue.

The Court: You better read the question to the witness.

Q. (By Mr. Maury): (Question repeated.)

A. It runs across Silver street at the north line or near the north line of—let me start that over again. It runs westerly crossing Dakota street close to the north line of Silver; thence diagonally toward the church at the southeast corner of Porphyry and Montana street, on the south side of that. There are several escarpments crossing Montana street in a parallel direction. How far do you want me to go west? It crosses to the position of the Bernice apartments on the west side of Montana street, one of the escarpments does; and thence it crosses Idaho street at the Morgan property which is about thirty or forty feet north of Porphyry street; then it crosses diagonally toward the northwest corner of Idaho and Porphyry at the point where Mr. Finlen

(Testimony of Edgar J. Strassberger.)

asked me several times, or asked me about several breaks in the water pipe. It crosses the water pipe in that location and then it goes southwesterly to the old Columbia hospital.

Q. Now I will ask you if all of the ground south of that escarpment and for a distance of 500 feet south is of the same level as it was in 1922?

A. No, sir.

Q. And is it plain to be seen that that ground has sunk right at that escarpment?

A. The north side of the escarpment is higher than the south side of the escarpment within a few inches. The normal level of the street was on a grade, even grade, and where that escarpment comes the south side dropped very perceptibly making a steep angle in the pavement.

Q. Are they successive drops south of that escarpment?

A. Yes, sir. [255]

Q. For what distance, approximately?

A. They show more clearly going down Montana street than either Idaho or Dakota until you come to a very large one in, I think it's the 600 block on Dakota street, and that's more than 500 feet below the one you speak of.

Q. Can you tell the court and jury if the ground has settled clear down to Aluminum street from that escarpment?

A. My opinion is that it has.

Q. And is it there to be seen?

A. Yes, sir; you can find evidence of subsidence.

Q. What is that evidence?

(Testimony of Edgar J. Strassberger.)

A. Broken sidewalks and buildings cracked.

Mr. Finlen: We object to that as calling for repetition.

The Court: Overruled.

Q. Go ahead.

A. And evidence of water pipes and gas pipes being broken and an explosion down at Aluminum.

Q. And were all of the points that Mr. Finlen asked you about in that area of subsidence?

A. Yes. They are in the area of subsidence.

Q. I mean the points of breakage of water mains.

A. Yes, sir.

Q. And had you walked over—or tell the court and jury when that subsidence, that escarpment first appeared on the surface so far as land which you were observing and were familiar with?

A. Well, the first one that I observed was an escarpment crossing Montana street about the southwest corner of Montana and Porphyry where the Jenson Drug is located [256] and diagonally northeasterly crossing Montana street into the Lloyd building. It entered the Lloyd building and continued northeasterly toward the intersection of Dakota and Porphyry.

Q. How close is the intersection of Dakota and Porphyry to the Poague property?

A. The north boundary of the Poague property is ninety feet south of the south line of Porphyry street.

Mr. Dwyer: We object as this witness has covered the same ground two or three times giving the directions and distance and so on.

(Testimony of Edgar J. Strassberger.)

The Court: Overruled.

Q. What was your answer?

A. Ninety feet.

Q. When did you first observe that escarpment, approximately?

A. I think in 1943; maybe 1942. Along in there.

Q. Was it there any great length of time before you observed it?

A. No, I don't think so. It was a pretty smooth street at the time.

Q. And was there a fresh break in the earth's surface from Gold street to the Jewish church in the Fall of 1944?

Mr. Finlen: We object to that as leading.

The Court: Overruled.

A. Well, subsequent to the one I just testified to it could have been in 1944. There was a small break at the intersection or north of the intersection of Gold and Jackson streets. It was just appearing. In fact I observed it and I thought some child had made a mark in [257] the dirt crossing the lot and I went and looked at it and it was just the beginning of an escarpment.

Q. When did that occur?

A. To the best of my recollection some time in 1944.

Q. And then did you observe its course or whether it changed or not?

A. I observed it that time and subsequent to that time. At that time I couldn't trace it over a hundred feet coming northeasterly. A little later I found a

(Testimony of Edgar J. Strassberger.)

continuation of that same escarpment going north-easterly.

Q. And then did it remain the same, or change?

A. It got very much worse.

Q. By very much worse?

A. It got bigger.

Q. It got bigger? A. Yes, sir.

Q. And how about the upper side corresponding with the lower side?

A. The lower side became lower in elevation than the upper side.

Q. Did it then become traceable clear through to the Jewish church? A. It did.

Q. I will ask you if that escarpment existed on the surface any earlier than 1942 in the area that you have mentioned from Cold street and Jackson to the Jewish church? A. Not to my knowledge.

Q. Did you walk over it frequently?

A. Yes, sir.

Q. And did you reside close to that area? [258]

A. I did.

Q. During all of that time? A. I did.

Mr. Maury: I think that's all. We may want a question or two in the morning, your Honor, but at the present that's all.

Q. (By Mr. Maury): Is that escarpment from Gold street and Jackson street through northeasterly to the Jewish Synagogue observable at this time on the surface? A. Yes, sir.

Q. And can it be observed where it crosses Wash-

(Testimony of Edgar J. Strassberger.)

ington street, Idaho street, Montana street, Dakota street and Jackson street?

A. Yes, it can be determined crossing all those streets.

Q. And anyone going there could see it right now? A. They could if they looked for it.

(Whereupon, an adjournment was taken until Thursday, April 3rd, 1947, at 10:00 o'clock a.m., when the trial resumed with Edgar Strassberger on the witness stand for further re-direct examination by Mr. Maury.)

The Court: Proceed, gentlemen, with the trial.

Q. (By Mr. Maury): Mr. Strassberger, on yesterday you were asked about certain elevations by the defendant's counsel, and whether they had changed, and you said that you could produce notes of the surveys that you had made and that it would enable you to testify which elevations had changed in the district? A. That is right.

Q. Have you those notes here?

A. Yes, sir.

Mr. Maury: I believe you requested this. (Handing [259] document to counsel for the defense.)

Q. Are these the notes, or does this sheet contain the notes which you referred to in your testimony yesterday? A. It does.

Q. You may tell the Court if those notes enable you to speak with accuracy what elevations have changed in street corners below Silver street, east of Montana street, north and including Porphyry street and west of Main street?

(Testimony of Edgar J. Strassberger.)

Mr. Finlen: I ask permission to interrogate the witness with reference to what elevations appear upon the notes.

The Court: Very well.

Examination

By Mr. Finlen:

Q. What original elevations appear upon your notes, Mr. Strassberger?

A. The official elevations used by the City of Butte in determining street grades and sidewalk elevations in that district.

Q. Is the instrument which you are now looking at an official City of Butte plat or instrument?

A. No, sir.

Q. But one prepared by you?

A. Prepared by me, yes.

Q. Were any of the elevations as shown to be official, or so called official elevations, verified by you?

Mr. Maury: We ask for better meaning of the word "verified." The actual verification means starting at sea level and running by railroads to Butte. That is, those elevations were made some 75 years ago, and then they have been used with certain bench marks that were [260] attached to those original verifications, or first ascertainments of elevations——

Mr. Dwyer (Interrupting): We object to counsel testifying and suggesting to the witness what to testify to in this case.

(Testimony of Edgar J. Strassberger.)

Mr. Maury (Continuing): and then the City and County engineers and surveyors verified with reference to bench marks here in this neighborhood that has been accepted since 1883 or 1884; and there is a difference in the meaning of the word "verified." "Verified" may be by sea level or verified from government bench marks which are accepted.

The Court: I think the whole matter was gone into at length yesterday, Mr. Maury, and the witness has testified that he did not verify any of the elevations; that he assumed and accepted as true some starting point or bench mark here in Butte and worked from that bench mark from which he took his elevations and measurements. That was gone into yesterday and he stated he did not verify the elevation since, as I understand the question so put by counsel. Is that true or not, Mr. Strassberger?

A. That is correct.

The Court: Proceed.

Mr. Finlen: We object to any testimony concerning the elevations unless they have been actually verified by the witness.

The Court: The objection is overruled. He apparently used as a starting point something that is taken to be true by the city officials here in establishing street levels and grades. [261]

Mr. Dwyer: There is no evidence in the record that these papers now being presented are taken to be true by the City. The proper way to prove the city records would be by the records themselves, and they are available to the attorneys if they wish to bring them in here.

(Testimony of Edgar J. Strassberger.)

The Court: I think you are correct except there has been much testimony given with reference to city maps and elevations on the city map and there wasn't any objection made at the time; had it been that the map itself was the best evidence, the objection would be well taken, but now in view of the testimony that has been given, it is too late. Proceed.

Mr. Finlen: That is all.

Further Redirect Examination

By Mr. Maury:

Q. You may tell the Court what street corners in that area have changed their elevation since 1922?

Mr. Finlen: To which the defendant objects on the ground and for the reason that it appears from the examination thus far that the question calls for information predicated upon so-called elevations that have not been verified by the witness, and has merely been assumed by him to be correct. On the further ground and for the further reason that it appears that the original elevations concerning which the witness might testify are taken from or purported to be taken from city maps or plats, and that such maps or plats are the best evidence of such elevations.

The Court: Overruled.

Mr. Finlen: Exception. [262]

Q. (Question repeated).

A. You want to know the change in elevations in certain blocks in that area?

(Testimony of Edgar J. Strassberger.)

A. Yes, and I asked for the street intersections or the corners.

The Court: Mr. Strassberger, when did you make the survey on which you compiled the map?

A. This survey was made in June, 1943.

The Court: And was that made by yourself or under your direction?

A. I ran the instrument and had helpers with me.

The Court: How long after you did the actual work on surveying, did you make the map in question?

A. Very shortly after.

The Court: And you keep notes of your survey as you make it?

A. Yes, sir.

The Court: Did you make the plat from those notes?

A. Yes, sir.

The Court: What have you got to say as to whether or not that plat is or is not correct?

A. The plat is correct.

The Court: And that it truthfully reflects the result of the survey you made and the notes you took at the time you were making the survey?

A. It does.

The Court: Very well.

Mr. Finlen: It now appears the last survey being made in 1943 and prior to the filing of the complaint in this action, the defendant objects on the ground and for the [263] reason that any change shown would only be a change determined prior to the filing of the complaint; and secondly, it is incompetent, irrelevant and immaterial for the pur-

(Testimony of Edgar J. Strassberger.)

pose of proving or disproving the issues in this case.

The Court: Overruled.

Mr. Finlen: Exception.

Q. (Mr. Maury): Now answer the question.

A. You want me to read all the elevations in that area, or any specific elevations?

Q. Just read the elevations. I asked for changes in elevations starting at Porphyry and Dakota street.

A. Porphyry and Dakota—the official elevation as contained in the city ordinance of the northwest corner of Porphyry and Dakota street is 617 feet. That is above sea level, our elevations as used for the City of Butte.

Q. 617?

A. Yes, the elevations given on this map are the last three figures before the decimal. 617 is probably 5,617. My elevation shown at the time I made the survey 615.71.

Q. What is the difference in inches?

A. That is given in feet.

Q. What is the difference in feet and inches?

A. One foot and 10/100ths of a foot lower.

Q. In 1943 then, the official elevation that you spoke of? A. That is right.

Q. Now you may take the corner—have you got the corner of Main and Porphyry and Dakota street? A. Yes, sir.

Q. Have you got three other corners? [264]

A. Yes, I have all those corners.

(Testimony of Edgar J. Strassberger.)

Q. What is the difference in the other three corners?

Mr. Finlen: For the purpose of the record, may the objections made at the time the last objections were interposed by the defendant and the objections before that be considered as going to all this testimony without the necessity of repeating.

The Court: Very well, the record may show it is considered that the defendant objects to each question asked to the witness, upon the same grounds as those expressed at length in the last two objections made by counsel; that the objections are overruled and the defendant is granted an exception to each of the rulings of the Court. Proceed.

A. The southwest corner of Dakota and Porphyry Street, the difference of the official elevation and the elevation I took is 1.97 feet; one foot and 97/100ths of a foot lower; the southeast corner is a difference of three and 27/100ths of a foot lower; the northeast corner is two and 12/100ths feet lower.

Q. The southeast corner?

A. I gave the four corners.

Q. Have you any notations there on Gold and Dakota street?

A. No, I have not. I have the official on Gold but I didn't run that far down at that time.

Q. Have you notations on Silver and Dakota?

A. Yes, sir.

Q. What if any change in elevation from the official elevation did you find there in 1943? [265]

A. Beginning at the northwest corner of Silver

(Testimony of Edgar J. Strassberger.)

and Dakota, the change is 32/100ths of a foot; about four inches higher. At the southwest corner is 58/100ths of a foot lower; about seven inches.

Q. And at the other corners?

A. At the southeast corner is 72/100ths of a foot; about nine inches lower. At the northeast corner it is very close to the official elevation. The official elevation there is 642 and my elevation is 641.93; that is 7/100ths of a foot greater.

Q. And there would be no appreciable difference?

A. No; you could probably pick it up where the rod was moved one way or the other.

Q. That would not be regarded as any change?

A. No, I wouldn't say there was any change there.

Q. Have you any data there as to the elevation at Montana and Porphyry?

A. Just at the northeast corner of Montana and Porphyry.

Q. What if any change?

A. The difference in elevation there is 28/100ths of a foot; that would be about three inches it showed at that time an increase higher than the official?

Q. It showed higher than the official?

A. That is right.

Q. Have you other elevations there in that area?

A. At the corner of Porphyry and the alley—wait a minute. I gave you the wrong one—the point I gave you there was Idaho and Porphyry.

Q. I wish Montana and Porphyry? [266]

(Testimony of Edgar J. Strassberger.)

A. I made a mistake; I gave you the four corners on Montana.

Q. Give the four corners of Montana and Porphyry?

A. The difference in elevation of the northwest corner of Montana and Porphyry is a sinking of $34/100$ ths, about four or five inches. The southwest corner of Porphyry and Montana is lower $43/100$ ths of a foot, that is about five inches; the southeast corner of Montana and Porphyry has quite a change. The official is 628 and I got 625.93. There is two and $7/10$ th of a foot—two and $7/100$ ths of a foot.

Q. Do you recall and can you fix that corner by a building that was there?

A. That is where the Lloyd Building was damaged and torn down.

Q. Now, the southwest corner—the other corners?

A. The northeast corner, at the northeast corner there was a subsidence shown in the sidewalk, one part of the sidewalk was like this desk (indicating), and right at the actual corner it dropped down. I took both elevations and compared it with the official elevations. The official elevation is 632 and the high point is 630.96, and is a foot and $4/100$ th lower than the official; and the lower point is one foot and $34/100$ ths feet lower than the official.

Q. How close is that to the Ella Poague property and in which direction?

A. The Ella Poague property lies southeasterly

(Testimony of Edgar J. Strassberger.)

I would say about,—well it would cross Porphyry street to Dakota. This map doesn't give the distance of the [267] street, but it is a block east and three lots south of the last corner I gave. Pardon me—it is a block east and 170 feet south to the north line of the Poague property, at the east end of the Poague property.

Q. From the Lloyd property you spoke of?

A. No, I gave it to you from the Lloyd property; I gave it to you from the northeast corner of Montana and Porphyry. The Lloyd property is the southeast corner.

Q. I wish the distance from the southeast corner. I was mixed up.

A. Well, it is closer to the Lloyd property.

Q. Mr. Strassberger, yesterday afternoon you spoke, in answer to Mr. Finlen, of an escarpment crossing the street below the Poague property?

A. Yes, sir.

Q. Have you a photograph of that escarpment?

A. Yes, sir. Well, I wouldn't say it was of that escarpment. It was the sidewalk where the escarpment was under.

Q. Is this the photograph? A. It is.

Mr. Maury: We offer it in evidence.

Mr. Finlen: We object to the photograph on the ground and for the reason it is too remote; there is no showing where it is. On the further ground and for the further reason that it is improper redirect.

The Court: Well, I think that portion of the

(Testimony of Edgar J. Strassberger.)

objection "there is no showing where it is" is well taken.

Mr. Maury: I'll further identify it.

Q. Mr. Strassberger, of what point is that a photograph? [268]

A. That is a photograph at a point, the building number is 524 South Dakota street. It is the block below the Poague property.

Q. And on the same street?

A. On Dakota street, yes sir.

Mr. Maury: We offer it.

The Court: The time of taking the photograph should be fixed.

Q. (Mr. Maury) When, approximately, was the photograph taken?

A. That was taken June 27, 1943.

Mr. Finlen: We renew our objection and the further objection that it shows a condition prior to the filing of the complaint in this action.

The Court: The objection will be overruled and the exhibit admitted in evidence.

(Plaintiff's Exhibit No. 27, a photo of building at 524 So. Dakota St. taken June 27, 1943, was here received in evidence. The same will be certified to the Circuit Court by the Clerk of this court).

Q. Have you noticed any change in elevation nearer to the Poague property than those you have mentioned?

A. I testified the different elevations of the southeast corner of Porphyry and Dakota which

(Testimony of Edgar J. Strassberger.)

would be about 90 feet north of the Poague property; that is 90 feet north of the east end of the Poague property. I also took the elevation at the alley, which would be also 90 feet north of the rear end of the Poague property, and the elevation crossing the alley.

Q. What were the changes in those elevations?

A. Taking the southwest corner of Dakota alley and Porphyry street, using the city system of naming the alleys as the alley east of the street—no, west of the street—I am giving as Dakota alley. The difference there is a sinking of two and $14/100$ ths feet across the alley, the point 60 feet north of the rear end of the Poague property, which is the southeast corner of Porphyry and Dakota alley. There is a difference there of three feet, a sinking of three feet.

Q. What direction is that point from the Emma shaft?

A. The Emma shaft is northeasterly a little over one block north and about a block—it is about a half a block east of Dakota street.

Q. And how far is that point from the Poague property and what direction?

A. Well, I would assume that to be between five and six hundred feet northeasterly.

Q. Of the Poague property?

A. Of the Poague property. That is the Emma shaft.

Q. I am talking about this point on the map and not the Emma shaft.

(Testimony of Edgar J. Strassberger.)

A. I testified one point on the alley was 90 feet north of the Poague property, directly north along the alley line, and the other point was on the alley line, crossing the alley. They both would be within 100 feet of the rear end of the Poague property on the alley.

Mr. Maury: That is all, take the witness.

Recross Examination

By Mr. Finlen:

Q. By whom were these so-called official elevation [270] established?

A. I believe they were established by the City Council.

Q. Did the City Council do the surveying?

A. No, I don't think so.

Q. Well, that's what I am directing your attention to. Who determined the elevations?

A. I don't know.

Q. Do you know whether it was the engineer or not? A. I don't know who he was.

Q. When were they determined?

A. I would have to look up the ordinance to determine that.

Q. Can you determine it from the ordinance?

A. I imagine the ordinance would show the passage of some ordinance that dealt with the official elevations.

Q. I am not talking about the passage of the ordinance. I am talking about the time that the elevation was determined by the person who determined it. A. The time it was determined?

(Testimony of Edgar J. Strassberger.)

Q. Yes. A. Well, it was prior to 1920.

Q. How much prior?

A. I don't know. I don't know when it was established.

Q. Probably 75 years ago, would you say?

A. Well, I can't tell.

Q. Can you tell whether the elevations as determined were correct?

A. I assume them to be correct.

Mr. Finlen: I ask that the answer be stricken and [271] the witness respond to my question.

The Court: Yes, the answer will be stricken. Answer it yes or no. A. No.

Q. Now, let us take the first elevation at the northwest corner of Porphyry and Dakota street.

A. Yes, sir.

Q. Where the so-called official elevation differed from the elevation as assumed or determined by you in 1943?

A. Yes, sir. What is the question?

Q. I am merely directing your attention to it preliminarily.

A. The northwest corner of Porphyry and Dakota street, yes, sir.

Q. At what point on the northwest corner of Porphyry and Dakota street was the elevation determined in the so-called official determination?

A. At the intersection of the property lines.

Q. At the intersection of the property line?

A. Yes, sir.

Q. Is there a bench mark there? A. No.

(Testimony of Edgar J. Strassberger.)

Q. And was there a bench mark there at the time you determined the elevation at that point?

A. No, sir.

Q. How do you know that the person or persons who made the so-called original determination of elevation used that point if they left no bench mark?

A. The sidewalk was graded, the ground was graded; [272] the cement sidewalk was put in usually to grade by the City Engineer.

Q. If you don't know when the original so-called official determination of elevation was made, how do you know that the sidewalk was there when the elevation was determined?

A. I don't know positively that.

Q. You don't know at all, do you, Mr. Strassberger?

Mr. Maury: Objected to as argumentative.

The Court: Sustained.

Mr. Finlen: Well, he doesn't know positively.

The Court: Well, if he doesn't know positively, he doesn't. That is the answer to the question.

Q. (By Mr. Finlen): Let us go to the elevation concerning which you testified, the southwest corner of Porphyry and Dakota street.

A. I could give the same answer to all of them.

Q. You don't know the point of determination of the elevation at any of the points concerning which you testified, by the person or persons who made the so-called original determination?

A. Yes, I know the points, but I understood you to ask if there was a bench mark left there.

Q. What point did the person or persons who made the determination of the southwest corner of Porphyry and Dakota street use?

A. The southwest corner of Porphyry and Dakota—now please repeat the question?

Q. What point did the person or persons who made the so-called official survey use at the southeast corner of [273] Porphyry and Dakota streets?

A. I assume he used an intersection of property lines.

Q. But do you know whether or not he did?

A. No, only the record shows that he did.

Q. What record?

A. The ordinance and the City maps.

Q. What ordinance?

A. The ordinance that adopted these elevations as official elevations.

Q. Are you referring to Ordinance number 130? (Handing document.)

A. Yes, that is right.

Q. What is there in that Ordinance that shows what point, at what point on the southwest corner of Porphyry and Dakota street the so-called official elevation was determined?

A. Why the City Engineers including myself, always use the intersections of the property lines as the point referred to in this ordinance where it says the northeast or northwest or southeast or southwest corner of any of the particular streets.

(Testimony of Edgar J. Strassberger.)

Q. In other words, you assumed that that was the point used without knowing?

A. Well, it is the custom.

Q. That is your custom and assumption, is that correct?

A. That is all the custom I know of interpreting their maps and elevations.

Q. What was the custom when the original or so-called official determination was made?

A. I wasn't there when it was made, but that is my [274] interpretation, when they adopted the elevations they adopted at the intersection street lines.

Q. If you were not there, then, why do you say it was the custom?

A. Well, I practiced civil engineering in the City of Butte for forty years and I made very many determinations for grade to build and erect, and that is the custom.

Q. Will you answer my question?

Mr. Finlen: I ask that the answer be stricken.

The Court: The motion will be denied.

Q. Mr. Strassberger, do you know that the grade at any point concerning which you testified with reference to checking or verifying so-called official elevations was the same at the time you made your checking as it was at the time the elevation was, as you would call it, officially determined?

Mr. Maury: We object. He testified that all of them have changed; he has testified that all except one is changed.

(Testimony of Edgar J. Strassberger.)

The Court: That would be an answer to this question then, if that is a fact. That is what the counsel is asking him, as to whether or not there has been a change. I'll overrule the objection.

A. Before making a test on those blocks, I ran preliminary levels.

The Court (Interrupting): Just a minute: You were not asked about this. The question is whether or not there has been a change in grade or elevation from the time it was officially established. [275] A. Yes, there was.

Q. (By Mr. Finlen): How do you know that if you didn't verify the official elevation?

A. I assumed the elevations of the block corners as established and adopted by the ordinances to be the official elevations, then before making a survey over the entire area I checked a number of blocks to see if the relative elevations agreed or checked, and when I found a section of that area where the subsidence was at a minimum and the various points checked that elevation, I assumed that particular block corner as correct and used that one point for the entire survey of that district. All the elevations are based on that particular point.

Q. Well, you didn't know that the elevation had changed except by assuming that the so-called official elevation was correct?

A. Well, it is more than assuming. I checked the neighboring elevations to prove to myself it was correct.

(Testimony of Edgar J. Strassberger.)

Q. Did you prove to yourself that the original elevation was correct, or so-called official elevation was correct?

A. So far as that part of the area is concerned, yes.

Q. What official elevations did you find to be correct?

A. At the southeast corner of Idaho and Silver.

Q. The southeast corner of Idaho and Silver, Mr. Strassberger? A. Yes, sir.

Q. That is the area that used to be known as Buffalo Gulch, is it not?

A. I don't think so. I think Buffalo Gulch is a [276] block and a half east of that point.

Q. Well, directing your attention to that point, is there a cement sidewalk there now?

A. Which point do you mean?

Q. The southeast corner of Idaho and Silver?

A. Yes, sir.

Q. A concrete sidewalk? A. Yes, sir.

Q. Does that concrete sidewalk extend to the corner of the property line?

A. It is on the property lines.

Q. Did you take your elevations at the top or upper surface of the sidewalk? A. Yes, sir.

Q. Do you know whether or not the sidewalk was in place there when the so-called official elevation was determined? A. No.

Q. Mr. Strassberger, I believe I asked you, but in case I have not, what is the date or what are the dates of the determination of the so-called official

(Testimony of Edgar J. Strassberger.)

elevations. I am not talking about the passage of the ordinance now. I am talking about the date the person or persons who made the determination, or arrived at their determination.

A. I don't know when they were first made.

Q. Showing you what has been marked for identification as Defendant's Exhibit 28, is this sheet concerning which you testified and used by you in testfying with reference to changes in elevations?

A. Yes, sir. [277]

Q. And it was prepared by you?

A. It was.

Q. And so far as you know, is true and correct?

A. Yes, sir.

Mr. Finlen: If the Court please, we offer in evidence what has been marked for identification as Defendant's Exhibit 28.

Mr. Maury: We have no objection to it.

The Court: Very well, the exhibit will be received in evidence without objection.

(Defendant's Exhibit No. 28, a chart showing street grades, etc., was here received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

Mr. Finlen: And we ask leave that defendant may refer to it or show to the jury at any subsequent time.

The Court: It may be referred to by either counsel at any time during the progress of the trial.

Mr. Finlen: That is all.

(Testimony of Edgar J. Strassberger.)

Redirect Examination

By Mr. Maury:

Q. Mr. Strassberger, are those changes in elevation visible to the eye and can be seen at the present time?

Mr. Finlen: Object to that as calling for repetition.

The Court: Sustained.

Mr. Maury: That is all.

(Witness excused.) [278]

WILLIAM A. O'KELLY

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. O'Kelly, please state your name to the court and jury? A. William A. O'Kelly.

Q. What official position do you hold with the Anaconda Copper Mining Company?

A. Chief mining engineer in Butte.

Q. And by "Butte" you mean the entire Butte district? A. Yes, sir.

Q. It would extend to anywhere in Silver Bow County? A. Yes, sir.

(Testimony of William A. O'Kelly.)

Q. How long have you held that position?

A. Since 1935.

Q. And before that, were you employed by the same company? A. I was.

Q. How long, Mr. O'Kelly, and in what capacity?

A. I was employed since June, 1910, in various capacities of miner, sampler, mining engineer, geologist, assistant chief mining engineer.

Q. And during that time, Mr. O'Kelly, have you been familiar with the Emma Mine?

A. I have been familiar with the Emma Mine intimately since about 1932.

Q. And previous to that had you been down underground through the mine on work?

A. Yes, I have. [279]

Q. At frequent intervals?

A. Not prior to that frequently; occasionally.

Q. And since 1932 frequently?

A. Yes, sir.

Mr. Maury (Addressing counsel for defendant): I take it you will agree that Mr. O'Kelly's qualifications to testify as an expert are sufficient.

Mr. Dwyer: Considered so, an expert mining man and expert engineer. I thought you might be calling him in some other capacity.

Mr. Maury: No, not now.

Mr. Dwyer: We will admit Mr. O'Kelly's qualifications as a mining engineer, geologist, and experienced in the operation of a mine.

The Court: Let the record so show.

(Testimony of William A. O'Kelly.)

Q. (By Mr. Maury): How deep is the shaft on the Emma Mine, just approximation?

A. It is 50 feet or more below the 1600 level.

Q. And when did the work arrive at the 1600 level, approximately?

A. I think around 1915 or 1916; I would not be sure about the date; I would have to look that up.

Q. Mr. O'Kelly, can you tell the jury what a stope is?

A. A stope is an excavation between levels on the vein.

Q. Have progress maps been kept that were correct of the work done since 1915 in the Emma Mine?

A. They have.

Q. And through the Emma shaft? [280]

A. Yes, sir.

Q. There is another mine connected with the Emma called the Travonia or Travoni; or does anybody know which it is?

A. Yes, I know it is Travonia.

Q. Are there underground connections between the Travonia and the Emma?

A. There are.

Q. And when were they driven, the first of them?

A. The connections were driven since 1942, I believe.

Q. What company has been working the Emma Mine since 1917?

A. The Anaconda Copper Mining Company.

Q. And what company has been working the Travonia since it opened?

(Testimony of William A. O'Kelly.)

A. The same company.

Q. The Travonia had been worked many years, and probably it was the first quartz mine opened south of Walkerville?

A. I believe it was worked by the Clark interests at one time. In recent years it has been worked by the Anaconda Copper Mining Company.

Q. And by "recent years" you mean what?

A. Since 1940 or thereabout.

(Recess.)

Q. (By Mr. Maury): Mr. O'Kelly, since 1917 the underground workings in the Emma Mine have been exposed to air?

A. Certain portions of them. [281]

Q. So far as they have been made. I mean the mine has never been allowed to fill with water?

A. No.

Q. What effect has air on mine timbers?

A. Depending on the moisture content; moisture and warm air will change mining timbers.

Q. And by "warm" what degree of heat is classed warm?

A. Well, ground heat at that elevation would be enough, unless it were ventilated mechanically, or by man.

Q. And at times the Emma Mine has been worked?

A. The Emma Mine has been open and been in operation continuously.

Q. Has been worked at all times?

(Testimony of William A. O'Kelly.)

A. There has been work at all times to some extent.

Q. Ever since it was opened? A. Yes, sir.

Q. Mr. O'Kelly, are the stopes all timbered in the Emma Mine so far as you know?

A. I know they have been timbered.

Q. What kind of timbering is used in stopes?

A. Various systems of timbering are used. The principal method in use at the Emma would be the square set timbers in which the timbers are about ten by ten timbers which are placed in the mine with the height of about eight feet to the square area of about five and one-third feet.

Q. Are those timbers dressed chemically?

A. Some of them are.

Q. When did you commence dressing chemically? A. I couldn't say just the date. [282]

Q. Approximately?

A. Approximately 25 years ago.

Q. Are all mining timbers dressed since then, dressed chemically?

A. No, a very small proportion are dressed chemically?

Q. Are timbers in the stopes in the Emma Mine dressed chemically? A. No.

Q. What kind of timbering is used, pine or fir?

A. Usually fir.

Q. And the longer those timbers are exposed to the air, the more apt they are to disintegrate?

A. The timbers in the stopes are not exposed to air for a very long period, because filling is intro-

(Testimony of William A. O'Kelly.)

duced and they are then cut off from the action of the air.

Q. And the wider the vein of ore that is taken out, the less filling is mined as waste, is it not?

A. No, I wouldn't say that.

Q. For instance, the aim is to take out all the ore that is merchantable in the mine as you go along?

A. That is right.

Q. And the wider the ore body, the less waste is blasted down?

A. In stopes?

Q. Yes.

A. No, I would say the greater proportion of waste is blasted down.

Q. Can you tell us how deep in the workings from the Emma extend down the vein toward the south? [283]

A. The 2100 level is the bottom level of the mine and this is connected by a winze from the 1600 level of the Emma Mine.

Q. And the mine has been worked down a vein as far as the 2100 foot on the incline of the vein?

A. Approximately the 2100 level; sometimes it is not exactly the distance.

Q. And have progress maps been kept of that?

A. They have.

Q. You may describe to the court and jury the method of keeping the progress maps? I mean the manner of making the progress maps.

A. I think I understand. It is an important operation to keep the progress records, if I may

(Testimony of William A. O'Kelly.)

explain. The engineers are required to go underground and map accurately all excavations. The maps of those excavations are correlated with surveys of the underground workings by transit. The sketches are then brought into the office and platted on maps which represent every eight feet or approximately that in elevation over the entire properties of the company.

Q. And every effort is made to make correct progress maps, is it not?

A. They are correct.

Q. And those maps are then kept by you or in your department? A. Yes, sir.

Q. And you have given of the underground workings to Mr. Strassberger correct maps as to the progress of the workings in the area that were called for? [284] A. That is right.

Q. In September of 1945 did you notice a change in the surface of the earth near a corner of Gold and Jackson street?

A. I can't recall the date. I think it was about that date when I noticed a change in the street where there was a break occur, and the south portion of the street was lower in relation to the north portion along that plane.

Q. Now that has been called by you an escarpment? A. Yes.

Q. So far as you know, that escarpment had not existed there previous to 1945?

A. No, it had not.

Q. And when you saw it there, was it evidence of a new and recent change? A. It was.

(Testimony of William A. O'Kelly.)

Q. Was that escarpment traceable to the north-east? A. Yes.

Q. Can you give the general outline of that escarpment as you could trace it on the surface?

A. Well, it could be traced in an almost straight line with slight deviations between that point and a point in an alley at the east side of the Jewish synagogue between Dakota and Colorado and north of Silver.

Q. Can you tell us where Nellie Poague's property is?

A. Yes, I have examined her property.

Q. Is that escarpment which you spoke of north of her property? [285]

A. It is north of her property.

Q. How far north?

A. I would say about a block and a half.

Q. And by a city block, does that mean 300 feet?

A. 300 feet or perhaps 450 feet, more or less.

Q. What caused that escarpment?

A. That escarpment was caused by movement of the middle fault, which is a large fault in this district that traverses the entire mining area, and the fault moved and caused the escarpment.

Q. And what caused the movement of the fault?

A. Well, I can't say what the total cause was, but my opinion is that mining in the Emma vein along which the fault runs had caused at least some of this movement.

Q. From Jackson and Gold through to the alley by the Jewish Synagogue? A. Yes, sir.

(Testimony of William A. O'Kelly.)

Q. And have you found evidence of movement further south on Dakota street?

A. There is evidence to the eye of other escarpments along planes of movement south of that point on that line of movement.

Q. And how far to the south of Nellie Poague's property?

A. Well, I can't say except that possibly the 600 block, which would be Aluminum street.

Q. And the Webster School faced Aluminum from the north? A. Yes.

Q. Did that escarpment extend from the region of the [286] Webster School northeasterly towards Main street? A. No.

Q. Which way does it go?

A. Approximately east and west, I would say.

Q. How many escarpments have you noticed to the south of the escarpment that we speak of from the corner of Gold and Jackson to the alley by the Jewish Synagogue?

A. Well, just one escarpment along that line.

Q. I say, how many to the south of that have you noticed? A. I couldn't say.

Q. More than one? A. Yes, several.

Q. And when, approximately, did those escarpments first arise?

A. I first noticed them in 1941, and first noticed the one along the middle fault at that time.

Q. And what did you observe and where was it you first noticed it?

(Testimony of William A. O'Kelly.)

A. I first noticed it on Montana street between Silver and Porphyry near the Sullivan Tin Shop.

Q. And that was the escarpment of Gold and Jackson street to the alley, was it not?

A. Yes.

Q. When have you noticed other escarpments south of that?

A. Well, the second one that I remember was the one at Dakota street and Porphyry, the north-west corner of Dakota and Porphyry. [287]

Q. How close would that be to the Nellie Poague property?

A. 150 feet north of the Poague property, I should say.

Q. And when did you notice the one south of the Poague property first?

A. In the 500 block on Dakota Street I think in 1942 some time, I first noticed that one.

Q. And how did those dates correspond with the progress of work in the Emma mine, or in the Travonia Mine?

A. Those escarpments were observed almost simultaneously with the work mining the manganese ore for the war effort.

Q. And that would be about 1941, 1942 or 1943?

A. That is right.

Q. Or 1944 and 1945?

A. Yes, sir.

Q. And those escarpments were they caused by that mining?

A. I think they were. I think they were planes

(Testimony of William A. O'Kelly.)

of movement along the faults on veins and bounding blocks of the movement.

Q. And you spoke about fault planes running along the Emma vein from Gold Street and Jackson to the alley east of the Jewish Synagogue?

A. Yes, sir.

Q. Does that fault plane dip under the Nellie Poague property?

A. I can't say that. It has a dip but just how far [288] south I know it to be, it is difficult for me to say.

Q. What is the dip of that fault plane?

A. Well, I can't say that, Mr. Maury.

Q. Can you by data tell us what that dip is?

A. I could find out.

Q. That is what I mean. Can you find out and let us know this afternoon?

A. Yes.

Q. And the dip does not vary, does it?

A. Yes, it does.

Q. Where does it vary?

A. Well, all veins and faults vary in dip.

Q. I wish you would find out the general course of the dip and average dip of that fault from a point on Dakota Street near Silver. You can do that?

A. Yes.

Q. And tell us what the dip is to the south?

A. Yes.

Q. Now, is a fault characterized by slick material?

A. It is characterized herein Butte by a clay gouge.

(Testimony of William A. O'Kelly.)

Q. Can you give us any idea of the volume or width of the clay gouge? It differs on different faults but on that fault.

A. In the middle fault it would aggregate from perhaps eight, ten or twelve inches of gouge altogether.

Q. A fault is not caused by any physical mining of the Anaconda Company, is it? It is a natural thing.

A. Not a geological fault.

Q. This is a geological fault. I am not talking about human faults or anything like that, but a geological fault.

The Court: You might explain to the jury what a fault is.

Mr. Maury: Yes, that should be explained.

A. The crust of the earth is composed of blocks of solid material for some distance down and some geologists have indicated a depth as much as fifty miles for the big earth faults. The earthquakes are caused by a movement of those blocks on the earth's crust, and the slippage may be anywhere from fifteen to twenty feet between two blocks of the earth's crust, and that would cause a major disaster.

Q. Was the slippage of the San Francisco earthquake in 1907 but six feet?

A. No, it was a maximum of fifteen feet.

Mr. Finlen: This is very interesting but I don't see what it has to do with the case.

The Court: Very well, proceed.

(Testimony of William A. O'Kelly.)

A. (Continuing) Along those planes of movement between blocks of the earth's crust are what we call fault planes and those fault planes are characterized in the granite by clay, that is formed by a slippage between those planes underground and where you run across a clay slip you always know one block has moved in relation to the block on the other side of clay slipping.

Q. Is it a grinding instead of slipping?

A. Slipping and grinding of the material and particularly the granite will cause clay, while in some material it is not formed, it is formed in Butte in the [290] Butte granite because clay comes from the materials out of which granite is composed.

The Court: Mr. O'Kelly, when you refer to a fault, does that mean the resultant position of the earth after the slippage has occurred?

A. That would be the effect of the fault.

The Court: That would be the effect of the fault?

A. Yes, sir.

The Court: And that is the visible effect?

A. The effect of the fault would be the appearance of the gouge with the clay slip; and I might state that in the Continental fault which moved about fifteen hundred feet which made 25 feet of slip; that is the gouge size of the fault is the width of the clay you meet underground when you meet plane movement.

Q. (By Mr. Maury): The Continental fault is the thing that looks like an old stage road going over the hills to the south?

(Testimony of William A. O'Kelly.)

A. No, that is the third time that I corrected you on that. That is a dyke and that is not a fault.

Q. Well, where is the Continental fault?

A. Just south of that, or west of it, rather.

Q. Mr. O'Kelly, you must correct me at all times when I don't know anything about the subject. Is the granite in Butte solid or has it joints?

A. All the granite has joints.

Q. About how close together are those joints in the granite of the Emma Mine?

A. I couldn't say.

Q. I mean, of an average, are the joints within a [291] foot or two feet of each other?

A. In some places, and other places might be five or six feet apart.

Q. The granite then is not what you call a solid mass but has riffs or seams in it?

A. If you would drill through it, you would consider it solid because the joints or seams are sealed with mineralization as a rule.

Q. But you never saw a piece of granite that is five cubic feet in each direction?

A. You see very large blocks of granite in the area around Butte.

Q. But I mean in the mines of Butte, you never take out a piece of granite five cubic feet?

A. Yes, quite often.

Q. But the average is much less?

A. The average is less.

(Testimony of William A. O'Kelly.)

Q. Do the solids flow under sufficient pressure?

A. Well, it is said they do.

Q. That is accepted by the engineering fraternity? A. I think so, yes.

Q. As a truth? A. Yes.

Q. How many tons or pounds would be in a cubic yard of granite, approximately?

A. It runs in Butte about 12 cubic feet per ton in solid form.

Q. And as a mine grows deeper, the weight upon the timber increases, doesn't it?

A. No, I don't think so. [292]

Q. You don't think that it is subject to pressure and greater pressure?

A. Not in Butte; I haven't observed that in Butte.

Q. Have you noticed that your stopes cave when left?

A. If they have not been filled.

Q. They do cave?

A. If they haven't been filled.

Q. What causes that caving?

A. Primarily, it is caused by the action of the air on the portions of the walls or sides of the excavation that has been shattered by blasting.

Q. When the ore, or material, whatever it is, is removed close to a fault, is there a tendency of the material above to slip down into the excavation? A. That is right.

Q. And that really is what caused that escarpment from Gold Street to the alley, is it not?

(Testimony of William A. O'Kelly.)

A. My opinion is that it caused part of it.

Q. That it was a contributing cause?

A. Contributing factor.

Q. Mr. O'Kelly, the area affected by underground mining is not always in a vertical direction, is it?

A. Well, I would say it was primarily in a vertical direction. It is gravity which causes movement; it is the weight of the material.

Q. Primarily, but I am talking about the result of underground mining in a vein. The surface area affected is not always vertical above the excavation, is it?

A. Areas could be affected that are not vertically over the openings, that is true. [293]

Q. There is an area affected at the Columbia Hospital by underground workings from either the Emma or Travonia? A. Yes.

Q. And the underground workings are not vertically under the area affected at the Columbia Hospital, are they?

A. No, but the fault is under that or runs through it.

Q. The fault runs through right at that point?

A. Yes.

Q. And the mine workings are how far to the south vertically of that point?

A. I would say around 300 feet. Is that what I said before?

Q. No, 250 feet.

A. Well, I'll make it 250, then.

(Testimony of William A. O'Kelly.)

Q. And they are on the 300 level?

A. That is below the 300 level.

Q. Would your mind have been fresher some year or two years ago?

A. You said how far is the first workings?

Q. Yes. A. They are on the 300 level.

Q. And the first workings on the 300 level would be 250 feet south of the effect at the Columbia Hospital? A. Yes, sir.

Q. And the other workings were below the 300?

A. There was no stoping above the 300.

Q. There was no stoping above the 300? [294]

A. No.

Q. And it was caused by mining there at the 300 level?

A. It was caused by movement of the middle fault which I think was partially caused by the mining below.

Q. And the mining was from 300 down?

A. Yes, sir.

Q. The levels are substantially 100 feet apart?

A. Well, they are not, but for the purpose of illustrating the matter to the jury, they could be called that.

Q. They are sometimes 125 feet? A. Yes.

Q. And sometimes 90 feet?

A. That is right.

Q. As you leave the point at the Columbia Hospital going below the 300 workings get further from the vertical than at the 300?

A. That is right.

(Testimony of William A. O'Kelly.)

Q. So that the underground mining might have been as deep there as 1500 feet? A. No.

Q. How deep?

A. I would say ten or twelve.

Q. Ten or twelve hundred feet?

A. Yes.

Q. Now, have the workings of the Emma Mine gone directly under the Nellie Poague property?

A. Yes, they have.

Q. And when would you assign as near as you can from memory the date that those workings got under the [295] Ella Poague property?

A. I think as early as 1918 the workings probably ran under that area.

Q. And then they were extended further to the south on the vein? A. Yes.

Q. When did the main work for the taking of manganese for the government as you say, for the government, commence at that region of the Emma Mine?

A. I would have to examine the records to say exactly but probably 1941 or 1942.

Q. That is close enough. We don't ask you to examine them or be bothered about it any further. Can you give us just roughly the approximate number of tons taken from the Emma shaft since 1940?

A. Well, I couldn't exactly.

Q. I know not exactly, but can you within a million tons?

The Court: I think that would certainly not be exact enough.

(Testimony of William A. O'Kelly.)

A. I have not memorized these things but I can look it up and tell you.

Q. Can you tell us at two o'clock?

Mr. Dwyer: Of course, we object to anything like that as not within the issues here.

The Court: The objection is sustained.

Mr. Maury: We except.

The Court: Granted.

Mr. Maury: You may cross-examine. [296]

Cross-Examination

By Mr. Dwyer:

Q. Are you familiar with the type of mining carried on in the Emma Mine under the lease of the Butte Copper and Zinc Company to the Anaconda Copper Mining Company? A. I am.

Q. What have you got to say as to what that character of that mining was?

A. Well, the character of that mining has been the same as the character of mining in any of the Anaconda Copper Mining Company's mining.

Q. How long has it been in effect in the city of Butte as far as you know?

A. Since 1910.

Mr. Maury: Just a moment. The question of care or lack of care is not in the case and we shall object to any cross-examination going in that direction.

The Court: Well, it seems to me that your direct examination went extensively into mining opera-

tions in the Emma ground. The objection will be overruled.

Mr. Maury: We wish to preserve our point of law.

Q. (By Mr. Dwyer): What is the method generally? Explain to the jury how you mine ore in Butte and what you do with the excavation.

A. The method of mining is to sink a shaft in the area where you are intending to mine and to run cross-cuts out from that vertical shaft where you cut the vein and explore that by drifting along the vein and then run raises up from those drifts and later take out the ore between the raises in what are called stopes. [297] As your stoping progresses, waste is introduced into the stopes from the development work and all stopes are filled underneath the mining floor at all times. That is done for several reasons, the principal one is to protect the miner and workman from the caving of the ground and unsafe conditions. One other reason is to support the levels above to the surface, above that. That filling is introduced through the raises that have been run prior to the stoping and all excavations are filled between the levels.

Q. Is that true in the operation of the Emma Mine, by the operation of the Anaconda Copper Mining Company?

A. That is the program method used in the Emma Mine.

Q. What is the custom in the Butte district with reference to the amount of surface ground that is left above the workings?

(Testimony of William A. O'Kelly.)

Mr. Maury: We object; that is not material and it is outside the issues and not proper cross-examination.

The Court: Overruled.

Mr. Maury: We except.

A. In the case of the Emma area, we haven't mined, the Anaconda Company has not mined any stopes above the 200 level in a large part of the area, and in a large part of the area not above the 300 level.

Q. Now explain to the jury, taking this exhibit which is marked 20B and say whether the 200 foot area is from the topmost workings to the surface of the ground? A. It is.

Q. So that, in the Emma district you have no mining closer to the surface of the ground than 200 feet? [298]

A. There are a few small excavations but no stopings and no workings of any size anywhere.

Q. What is the small excavation?

A. It might be an excavation in a raise 13 by 7, or some such as that.

Q. Explain to the jury what a raise is?

A. Well, a raise is a working that is run from one level to the next level and is used for lowering timber and supplies into stopes that adjoin those raises; and also to introduce filling into those stopes and they are kept open during all the period of mining adjacent to those raises.

Q. Would you say "kept open"?

(Testimony of William A. O'Kelly.)

A. They are not filled along with the stopes until the stope has been finished.

Q. What is done to keep them open?

A. They are timbered.

Q. Would you compare them to a shaft or a well?

A. Yes, the walls are supported in such manner that they won't cave together any or slough off, and they are lined with boards so that rocks won't fall down on the miners working there.

Q. What has been the experience in this district with reference to subsidence of surface where the 200 foot mass of solid rock is left above the opening, or the highest workings?

A. Where they were no faults present, the 200 foot block of solid rock between the top workings and surface would prevent subsidence of the surface.

Q. Could the subsidence which you have described [299] along the escarpment of the Emma have been foreseen by any ordinary methods known to mining at that time?

Mr. Maury: To which we object as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Overruled.

Mr. Maury: Exception.

A. Well, I think not, because it wasn't anticipated and it was first noticed at the time the manganese mining was started, which was many years after the mine had been worked for zinc ore.

(Testimony of William A. O'Kelly.)

Q. What if anything was done following the observation of this subsidence along the middle fault with reference to the method of mining?

A. After discovering—regarding some method of timbering, speaking of movement along the middle fault, it was decided to introduce a new type of filling which was composed of sand and water, which since that time has been placed in all of the openings that are not in use, including drifts and cross-cuts and raises to the extent of nearly a half million tons of that material at this time.

Q. Hauled in from outside sources?

A. Hauled in from gravel pits in the area.

Q. State whether or not any other precautions were taken to preven this movement?

Mr. Maury: Our same objection.

The Court: Overruled.

Mr. Maury: May that be considered to go to all this line of testimony? [300]

The Court: It may be so considered.

Mr. Maury: And we take an exception.

The Court: Very well, the exception is granted.

A. (Continuing): Another thing that was decided on at that time was to mine portions of the vein and leave other portions unmined for some time until the filling had become solidified like cement or concrete and would support the movement of other areas later. So that, we are not at the present time mining continuously along the vein.

Q. To what period of operation did you ascribe the movement of the middle fault with reference to

(Testimony of William A. O'Kelly.)

change in filling, with reference to period of time?

A. I ascribe the movement of mining of large quantities of manganese ore in veins which were parallel to the zinc veins.

Q. I don't think you understood my question.

(Question read.)

A. Well, movement along the middle fault started to my knowledge around 1941, and the filling started in October, 1942, the sand filling.

Q. What have you got to say as to whether or not subsequent movement if any along there was due to the mining before the filling was placed in there?

A. It has been our experience in Butte that some squeezing of old workings is continuous. There has been some slight squeezing and movement in that area from old workings, and although not great, has been continuous from that cause.

Q. Beginning with the operation of the manganese, [301] of the mining in getting out manganese, would you say the movement has been the result of that operation before the fill?

A. I don't quite get your question.

Q. Before the method of filling started with the time when you started to mine manganese for the government for the war effort, would you say that the subsidence which you noticed in that area has resulted from the mining which was made at the beginning of the extraction of manganese up to the time you changed the method of filling?

(Testimony of William A. O'Kelly.)

A. I think there was subsidence from the mining of manganese and coincidental with the movement along the middle fault.

(Whereupon a recess was had until 2:30 o'clock April 3, 1947, at which time the trial resumed with W. A. O'Kelly on the stand for further cross-examination by Mr. Dwyer.)

Q. (By Mr. Dwyer): Mr. O'Kelly, you were asked about fault fissures. I don't know whether the jury has a fair understanding of that or not. Will you define a fault as a plane of movement in the earth? A. Yes.

Q. And you referred to the Continental fault. Will you explain to the jury a little bit more about the Continental fault, what it is and whether it is evident?

Mr. Maury: I think that is some distance from this case.

The Court: It was gone into in the examination in chief. Overruled.

A. We call it the Continental fault because of its size. In other words, it can be traced for many miles across the country. The whole crust of the earth is full of such faults, contains faults of that sort; many are just a few miles apart and many are hundreds of miles apart; but blocks bounded by faults are the chief make-up of the crust of the earth and they are moving all the time, in geological language. The Continental as we call it was at one time the valley at the top of the Woodville mountain, and the valley up there was the same elevation

(Testimony of William A. O'Kelly.)

as the valley down here below Butte, and this fault has dropped this whole country down about 1500 feet in relation to the valley at Woodville.

Q. Now, take the middle fault, if you were to build a house on top of that fault, what are the probabilities that the house will ultimately be cracked or broken?

A. The house might be injured during a man's life-time and might be injured several times by movement of that fault caused by earthquake, or crustal movement. It might not be hurt during thirty or forty years by chance moving, but it would stand a good chance of having something done to it if it were astride the fault at the surface.

Q. That movement may be up or down in relation to the blocks on each side, or horizontal in relation to these blocks? A. That is right.

Q. In other words, you might have, assuming this [303] was a fault between these two desks, you might have one of these desks slip endwise of that fault and drop down or raise up?

A. That is right, and we know that by a study of the faults in the mining area; we know that has happened.

Redirect Examination

By Mr. Maury:

Mr. Maury: I have some questions I should probably have asked on direct which I would like to ask now.

The Court: Very well.

(Testimony of William A. O'Kelly.)

Q. Mr. O'Kelly, has the Butte Copper and Zinc Company maintained a resident engineer here during the years the Anaconda Company has been working the mine?

A. I am not sure of that.

Q. Do you know Mr. Sam Barker?

A. Yes, I do.

Q. Is he in the employ of the Butte Copper and Zinc?
A. Not to my knowledge.

Q. What, in the way of progress reports, are opened to the Butte Copper and Zinc Company, and the progress maps of the Emma mine?

A. While I have not received any instructions except in the case of Mr. Barker, occasionally he has access to the maps.

Q. And whenever he asks access to the maps, it is given?
A. Yes.

Q. How long has that course been followed?

A. Well, so far as I know, since the Anaconda Company started mining the Emma mine.

Q. And has he access to the mine on request?

A. I think he has.

Q. Whenever he requests to go underground, if it was during reasonable hours, it would be permitted?
A. I think so.

Q. And to any part of the mine?

A. I think so.

Recross-Examination

By Mr. Dwyer:

Q. Do you know whether or not, as a matter of fact, he has been in the Emma mine?

(Testimony of William A. O'Kelly.)

A. I have not been with him in the Emma mine but I heard he has gone into the Emma mine.

Q. Of your own knowledge, you have never been with him and never have seen him down there, is that true?

A. No, I think I have never seen him in the mine.

Q. Do you know what periods that he did go into the mine? A. No.

Q. Whether it was a year ago or ten years ago?

A. No. I know that he has been in the office and has examined the records over a long period and that is all I know personally of his connection with the Butte Copper and Zinc.

Q. What do you mean by "records"?

A. The stope maps, such as we have furnished.

Q. The same maps we have furnished here?

A. That is right.

Q. Has he ever given any orders or direction in the [305] operation of that mine?

A. Not that I know of.

Redirect Examination

By Mr. Maury:

Q. How often does he come—you said frequently—how often has he come to see the records?

A. I would say maybe four or five times a year.

Q. And for how many years?

A. Well, since, to my knowledge, since 1931.

(Witness excused.)

Mr. Maury: We rest.

Mr. Finlen: If the Court please, comes now the defendant, the Butte Copper and Zinc Company, a corporation, at the close of the plaintiff's case, the plaintiff through her counsel having announced in open court that the plaintiff rested, and moves the court for an order to strike all of the witness Plummer's testimony relative to the water main leak on January 29, 1940, on Placer street south of Platinum street, on the ground and for the reason the evidence is incompetent, irrelevant and immaterial.

Second: On the further ground and for the further reason that the evidence does not tend to prove or disprove any issue in this case.

Third: Upon the ground and for the reason that no cause has been ascribed for the leak, no evidence given on which a conclusion as to the cause could be properly predicated.

And renews the same motion upon each and upon all of [306] the grounds mentioned in the preceding motion with reference to each leak concerning which the witness Plummer testified.

And renews the same motion on the same grounds with reference to each leak testified to by the witness Doran; and defendant hereby moves to strike the testimony of the witness Poague relative to plumbing leaks which the witness testified occurred at her property, upon the grounds mentioned in the foregoing motions and upon each of said grounds; and hereby moves to strike the testimony of the wit-

ness Strasburger with reference to the leak which he testified as occurring on Placer street at the property adjoining the Nelson property; and it makes the same motion with reference to the testimony of the leak testified by the witness Strasburger as having occurred at Idaho and Porphyry street, and with reference to the two last motions specifies as additional grounds the reason that there is insufficient evidence it appears from the testimony of the witness upon which the witness could predicate a conclusion as to the cause of each of the two said leaks.

The Court: Ladies and gentlemen of the jury, there is a matter which has been presented to me for a legal ruling which properly should be made outside of your presence at this particular time as it may require some particular discussion; so you will, in company with the bailiff, go out in the hall and hold yourself in readiness to return at call.

(Jury retires from the court room.)

Mr. Finlen: I would like to specify an additional ground to the motion originally made and that is with reference to the remoteness of time and place of the matters testified to, as being too remote.

Mr. Maury: I submit it is the duty of counsel moving to strike out, to specify exactly what is relevant and what is irrelevant and what is admissible and what is inadmissible.

Mr. Finlen: In the interest of time, if the Court please, I have made one motion and then the remainder is predicated upon the reasons stated in

that, but I can go through each one of these slips and object separately to each leak reported, if that would be any benefit to the Court, or improve the record. I'll say this: that if an expert who had sufficient knowledge upon which to predicate a conclusion had examined the pull or telescoping pipe and had given it as his qualified opinion that that pulling or telescoping was due to ground movement, we would be confronted by an entirely different question.

The Court: It is my opinion that the motion to strike the testimony of Mr. Plummer as to the condition of the water pipes and the necessity of repairs during the period of time that he testified to is well taken and due to the nature and condition of his testimony and the length of time of his testimony, it would be in my opinion for me impossible to intelligently separate what I consider being the incompetent from the competent and to charge or admonish the jury in such a way that it would be intelligible to the jury or would assist them in arriving at their decision in the case, or [308] would satisfy me in so doing they had not considered the evidence that I believe incompetent, for that reason the Court grants the motion as to the testimony of the witness Plummer.

Mr. Maury: Note our exception.

The Court: Note an exception.

As to the testimony of Mrs. Poague as to the leaks in the water pipes where she herself observed, and as to the repairs, and as to the repairs and

necessity of the repairs, the motion to strike is denied. As to the testimony of Mr. Strasburger as to the conditions that he personally observed and testified to with reference to the opening or excavations in the city streets in the area he testified to by the Butte Water Company and the fact that those excavations were filled with water that came from the water mains of the Butte Water Company, the motion of the defendant to strike that testimony is denied.

Mr. Finlen: There are two specific leaks that I moved with reference to the testimony of Mr. Strasburger concerning gas leaks and the Court has made no ruling concerning the various reports by the witness Doran.

The Court: With reference to those leaks, the motion is likewise denied—the gas leaks.

(The jury returns to the court room.)

The Court: As you heard, the Court has been requested to strike from the record as evidence in the case the testimony of Mr. Plummer who appeared here before you, the manager of the Butte Water Company and who testified as to leaks in the water mains of the [309] Butte Water Company and as to the condition of the pipes in the area that is involved in this case over a period of years. The Court has granted that motion and you are not in deciding this case or in arriving at your verdict, you are not to consider his testimony or the testimony as given by him as to the condition of the water pipes in any way whatsoever. You are to the

best of your ability to exclude that testimony from your minds and to consider the case as though he was never here. Now the reason for that is this: as you recall his testimony extended over a period of years and it appeared quite certain from his testimony that some of those leaks were caused through natural processes, through changes in the pipe and the wear in the pipe itself. There was other testimony given by him from which it might be determined by you, if you believed it, and if you believed the testimony of other witnesses, that as to some of the pipe damage that he testified to, that it might have been or was caused by ground movement. However, the two classes of evidence were in no way segregated or separated, and where it appears that part of the evidence is good and part is bad, why then of course the bad can not remain in the case and the good just goes out of the case with the bad. So you will disregard that in arriving at your verdict in this case.

Mr. Finlen: We ask an exception be given to the statement of the Court that part of the evidence was good and part was bad.

The Court: I mean to say, if there was evidence there you found was good or bad is a question for you. [310]

JOHN H. CURTIS, JR.

called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Dwyer:

Q. State your name to the Court and jury?

A. John H. Curtis, Jr.

Q. Where do you live?

A. In Butte, Silver Bow County, Montana.

Q. How long have you lived here?

A. I was born here—64 years.

Q. Are you familiar with the locality of the Poague home? A. Yes.

Q. Do you live anywhere near there?

A. Yes, three blocks away from there.

Q. What is your business, Mr. Curtis?

A. Real estate.

Q. Have you bought and sold property in the city of Butte? A. Yes.

Q. Have you familiarized yourself with the market value of properties in this city?

A. Yes.

Q. Over what period of time has your experience in that line extended? A. Since 1903.

Q. Have you examined the property of the plaintiff in this action, Nellie Poague? A. Yes.

Q. Do you know Mrs. Poague? [311]

A. Yes.

Q. And do you know where she lives?

A. Yes.

(Testimony of John H. Curtis, Jr.)

Q. Have you seen her property? A. Yes.

Q. Have you examined it with a view of ascertaining its reasonable market value?

A. Yes.

Q. State under what circumstances you did that?

A. Well, I was one of a committee of appraisers from the realty board to go down, and we went over the place the three of us, Mr. Redlich, Mr. Wulf and myself.

Q. Now, assuming that this property had not been damaged in any way except from ordinary wear and tear, in other words that there had been no injury by ground movement of any kind, what would you say the market value of that property was or is at this date?

A. Well, I think you might be able to get \$4,500.00 for it.

Q. That would be the market value?

A. Yes.

Q. That is, assuming no damage other than ordinary wear and tear? A. Yes.

Q. What salvage value has the property now in your opinion?

A. About \$250.00 salvage.

Cross-Examination

By Mr. Maury:

Q. Have you had experience in salvaging? [312]

A. No.

Q. As to buying and selling realty you have had experience? A. Yes.

Q. And you have lived in that neighborhood or

(Testimony of John H. Curtis, Jr.)

within two or three blocks of that neighborhood all of your life? A. Yes.

Q. Whereabouts, what street do you live on?

A. I live on the corner of Washington and Porphyry.

Q. And that is somewhat northwest or west of this property?

A. That would be west and slightly north.

Q. Mr. Curtis, would you say that real estate values have risen in Butte in the last few years? Would you say that the cost of building has risen?

A. Yes.

Q. And can you give some proportion, some percentage of its rising in the last five years in Butte?

Mr. Dwyer: Objected to as not proper cross-examination. This witness was interrogated as to the market value of the property and not the cost of construction.

The Court: Overruled.

A. Well, when we are writing insurance, we raise it forty per cent more, and right now I guess it is a little worse than that.

Q. I don't understand exactly—material and labor forty per cent more than five years ago?

A. Yes, I would say so. [313]

Q. And what is the reason for that raise in the neighborhood?

A. Yes. The cost of material and cost of labor has risen.

Q. But you would not say that there has been a

(Testimony of John H. Curtis, Jr.)

rise in the cost of labor and the cost of material, I mean building materials and building labor in Butte in the last five years to an extent of forty per cent or fifty per cent? A. Yes, there has been.

Q. And that it has affected the value of improvements such as this?

A. Well, this is an old house.

Q. This is an old house and yet in your opinion it would be worth \$4,500.00 if it were not injured?

A. Yes.

Q. Now, did you examine and see what injuries had been done to the property?

A. Yes, I think so.

Q. You went all through it? A. Yes.

Q. And went through the garage?

A. Yes. So far as going through the garage, she wouldn't let me go clear in.

Q. Why?

A. I guess she didn't want me to get hurt. The garage is pretty badly gone.

Q. And by "pretty badly gone" what do you mean? A. You can't use it.

Q. It is worthless? [314]

A. And in the house there is cracks in the plaster and the doors are jammed a little bit, that is about all you can notice there; but the garage is worse.

Q. Is the house on a line with the cracks in the garage, east and west? A. Yes.

Q. Have you noticed in the district close to

(Testimony of John H. Curtis, Jr.)

where you live on business a progressive nature of such cracks?

Mr. Dwyer: We object to this as improper cross-examination.

The Court: Sustained.

Q. Who requested you to go down there?

A. The Company; they had three of us go down.

Q. Who were the other two?

A. Mr. Redlich and Mr. Wulf.

Q. That is John Wulf? A. Yes.

Q. And what is Mr. Redlich's name?

A. Roy Redlich?

Q. They live here in Butte? A. Yes.

Q. Did you three consult there? A. Yes.

Q. And mentioned the various features of value or lack of value? A. Yes.

Q. And will you tell us how you arrived at any salvage value at all?

A. Well, it was more or less a guess, the figure we arrived at. [315]

Q. Did you figure how much it would cost to take it down? A. No.

Q. Did all three of you finally, after talking it over together, come to the same conclusion?

A. We figured to.

Q. And they all are real estate men?

A. Yes.

Q. And experienced here in Butte?

A. Yes, sir.

Mr. Maury: That is all.

(Testimony of John H. Curtis, Jr.)

Redirect Examination

By Mr. Dwyer:

Q. You all three made a report?

A. Yes, we made a report, a written report.

Q. Does that report differ from your testimony here or was it the same?

A. The same figures, \$4,500.00 less \$250.00 for salvage.

Q. Mrs. Poague is still living in the house?

A. Yes.

Q. And it is livable? A. Yes.

(Witness excused.)

C. C. GODDARD

called as a witness on behalf of defendant, being duly sworn, testified as follows: [316]

Direct Examination

By Mr. Dwyer:

Q. State your name to the Court and jury?

A. C. C. Goddard.

Q. Where do you live, Mr. Goddard?

A. 725 Maryland.

Q. How long have you lived in Butte, Silver Bow County? A. Steady since 1892.

Q. What has been your business?

A. Builder.

(Testimony of C. C. Goddard.)

Q. Contract builder? A. Yes, sir.

Q. Are you familiar with the property owned by Mrs. Poague, the plaintiff here? A. Yes, sir.

Q. What, if any, work did you do for her?

A. I built a garage in the rear of her lot.

Q. Have you examined that garage lately?

A. Yes, sir.

Q. Is that the same one you built?

A. Yes, sir.

Q. State whether or not you made a record of the amount paid to you by Mrs. Poague?

A. I did.

Q. Have you got that record?

A. Yes, sir.

Q. When was it made? A. In July, 1925.

Q. Was that the time of building? [317]

A. Yes.

Q. Will you produce the record? (Witness does). In whose handwriting are the entries in that record? A. They are mine.

Q. Do they correctly show the amount paid to you by Mrs. Poague? A. Yes, sir.

Q. What did she pay you? What was the total amount she paid you for building that garage?

A. \$1,297.60.

Mr. Dwyer: You may cross-examine.

Cross-Examination

By Mr. Maury:

Q. Did she pay you anything or was it Charles Poague?

(Testimony of C. C. Goddard.)

A. Charles Poague did the paying.

Q. She didn't pay you anything at all, did she?

A. I don't think so.

Q. Now, when was that garage built?

A. In July, 1925.

Q. You are still connected with the contracting business, or not?

A. Well, not active right now, no.

Q. You are somewhat acquainted with values of materials that are necessary for contract work?

A. How is that?

Q. You are still conversant with the values of materials that are used in work of that nature?

A. Yes.

Mr. Dwyer: We object to that as not proper cross-examination. [318]

The Court: Overruled at this time.

Q. Mr. Goddard, how do the prices of building materials and labor compare now with what they were in 1925 in Butte?

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial. This witness was put on for the purpose of impeaching the testimony of the witness Poague.

The Court: Sustained.

Q. Mr. Goddard, is one your sons in the geological department of the Anaconda Company?

A. Yes, sir.

Q. How long has he served in that department?

A. Why, I don't know. He got through the School of Mines in 1927 and I think he has been with them all the time and before that.

(Testimony of C. C. Goddard.)

Q. Your dealings with Mrs. Poague were not with her but with Charlie in the building of that garage?

A. Yes, I talked with both of them.

Q. Who paid you the money?

A. As I remember, the husband paid me the money, but I would not be sure about that.

Q. Let me see that record, please. (Witness produces record). Is that the entire record?

A. That is all, yes.

Q. When was that record made?

A. July 10, 1925.

Q. When was the writing, "Progue, John" put there?

A. It was put there at that time. [319]

Q. What is this on the opposite page?

A. That is some little job I did. It has not anything to do with that.

Q. What is the first item here on the page under "Progue"?

A. That is about the first part. The first part was to be 18 by 20 and it figured at this amount. (Indicating).

Q. No, what is the first item there on the first line, what was that for?

A. 14 by 18 by 3 to dig thirty yards \$75.00.

Q. What was the next?

A. Fourteen yards concrete foundation \$112.00.

Q. And the next?

A. Forms, 2,000 feet of lumber, \$140.00.

Q. And the next?

(Testimony of C. C. Goddard.)

A. 360 feet of basement flooring, 25 cents, \$90.00.

Q. Was that the price of the basement flooring?

A. Yes, at that time.

Q. Now what was the next?

A. 2,000 feet of framing lumber, \$150.00.

Q. Was that window frames?

A. No, rough lumber. That is the price installed.

Q. What is the next?

A. Four squares of roofing, \$28.00 installed.

Q. Was that the price of that?

A. Installed, yes.

Q. What is the next?

A. There was a step up on the side, a little stairs, \$25.00. [320]

Q. And the next?

A. Two sets of garage doors, \$100.00.

Q. The next item?

A. Those are ordinary doors, two ordinary doors, \$40.00.

Q. And the next? A. Hard crush, \$30.00.

Q. And the next? A. One coal chute.

Q. And the next? A. 12,000 brick, \$360.00.

Q. And the next item? A. Total, \$1,170.00.

Q. What is the next item?

A. Making the building 20 by 20 I added \$100.00 and made it \$1,270.00

Q. What is the matter along here?

A. Six feet of chimney \$9.00.

Q. And the next?

A. Extending foundation \$10.00.

(Testimony of C. C. Goddard.)

Q. And the next item?

A. One Yale lock \$3.25.

Q. And the next?

A. Four sacks of sand \$3.60.

Q. And the next? A. One yard of rock.

Q. Does the word "labor" appear anywhere on here? A. These prices include all labor.

Q. I asked you if the word "labor" appears?

A. No, I don't figure that way. [321]

Q. The word "labor" doesn't appear?

A. No.

Q. And you have no memory at this time what the labor on the building was?

A. My time book would show that.

Q. Where is your time book?

A. If I could find it,—I don't know as I could get it—I probably could find it though.

Q. In so far as this record can refresh your memory, there is nothing to show what labor there was?

A. Yes, everything is to show; there is brick \$360.00 at that price brick was ten dollars a thousand; there was \$120.00 for the brick; then we have mortar \$24.00 more and the balance would all be labor.

Mr. Maury: That is all.

(Witness excused.)

Mr. Finlen: The defendant rests.

The Court: Any rebuttal?

Mr. Maury: No. The plaintiffff rests.

Mr. Finlen: The defendant would like to make a motion.

The Court: Ladies and gentlemen, there is another matter to be presented to me, so you may step into the hall and hold yourself ready to return at the call of the Court.

(Jury retires.) [322]

Mr. Finlen: Comes now the defendant, Butte Copper and Zinc Company, a corporation, and moves the Court for an order directing a verdict in favor of the defendant and against the plaintiff upon the following grounds and for the following reasons:

1. That there is no evidence to support a verdict in favor of plaintiff and against the defendant.
2. That there is no evidence to support a judgment in favor of plaintiff and against defendant.
3. That there is no evidence that defendant by itself or by or through any agent, servant or partner has done underground mining which caused any damage complained of, and that there is no evidence that defendant as lessor is liable for or did or caused any damage complained of.

The Court: The motion will be denied.

Mr. Finlen: Exception.

Whereupon an adjournment was had until Monday, March 7, 1947, at 10:00 o'clock a.m., at which time the trial resumed.

The Court: Let the record show that after the completion of all of the evidence in the case and prior to the commencement of the arguments in the case, the Court announced its rulings as to the instructions tendered the Court by each of the parties herein and [323] requested to be given as follows:

The Court proposes to give instruction number two of the plaintiff as amended by the court in striking out the word "apexing," the fourth word in the eleventh line of the instruction; the Court proposes to give instructions 3, 5, 9 and 10 proposed by the plaintiff, and the instruction just handed to the Court by the plaintiff that the Court now numbers 11. Does the defense have any objection or exception to the Court in giving any or all of these proposed instructions?

Mr. Dwyer: The defendants object and except to the giving of instruction number two as tendered by the plaintiff and modified by the Court on the ground and for the reason that *if* makes defendants liable in this action without any proof that the defendant did any mining, supervised any mining or did any act or thing or supervised any act or thing either by itself or through any agent which resulted in damage to the property of the plaintiff.

The Court: The objection is overruled.

Mr. Dwyer: The defendant objects and excepts to the giving of instruction number three offered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it permits the jury to find from the evidence that the

defendant did actual mining on the premises in question, the evidence being entirely to the effect that the defendant did no mining and that all of the mining was done by the Anaconda Copper Mining Company.

The Court: The objection is overruled. [324]

Mr. Dwyer: The defendant objects and excepts to the giving of instruction number 5 as offered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it instructs or attempts to instruct the jury on matters that are not in issue in this case, there being no evidence of damage to neighboring property which affected the value or interest of the plaintiff and the value of the plaintiff's property in this case. For the further reason that it assumes that the defendant did actually conduct the mining on the property, when the evidence is all to the effect that the defendant did no mining. The rule of law being that in a case of subsidence to property due to mining the person who actually does the mining is the one who is liable for damages.

The Court: The objection is overruled.

Mr. Dwyer: The defendants object to the giving of instruction numbered 9 as tendered by the plaintiff and proposed to be given by the Court on the ground and for the reason that the evidence conclusively shows that no act of the defendant caused any damage to the property of the plaintiff herein; that the mining was done under a lease, the rule being that the person operating the lease is liable for surface damage caused by its mining operations

there being no evidence in this case to connect the defendant in any way with the management or operation of this lease.

The Court: The objection is overruled.

Mr. Dwyer: The defendant objects and excepts to the giving of instruction numbered 10 offered by the [325] plaintiff and proposed to be given by the Court on the ground and for the reason that it is based on the assumption that the defendant is liable for the damages sustained by plaintiff in this case, when the evidence shows that the damage was caused by the lessee under its lease from the defendant.

The Court: The Court will withdraw instruction number 10 proposed on behalf of the plaintiff and in its place will give instruction numbered 7 proposed on behalf of the defendant.

Mr. Dwyer: The defendant excepts and objects to the giving of instruction numbered 11 as tendered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it assumes that the jury may find against the defendant for acts which were not performed by it; and further allows interest in the case where interest should not legally be allowed.

The Court: The objection will be overruled.

Mr. Dwyer: We note an exception to the ruling of the Court in each instance.

The Court: Yes, the defendant is granted an exception to the ruling of the Court in each instance.

The Court will refuse to give instructions 1, 4, 6, 7, 8 and 10 proposed by the plaintiff.

Mr. Genzberger: To each and all of said refusals separately and respectively, the plaintiff excepts.

The Court: The exception will be noted. The Court proposes to give instructions numbered 6, numbered 7, numbered 8, and numbered 9 as modified by the Court by inserting after the word "not" on line 3, the words [326] "of itself," so as to make the instruction read "the cost of repairing or rebuilding the plaintiff's house and garage does not of itself prove or establish the market value" of the property;—numbered 10 and numbered 11 proposed by the defendant. Does the plaintiff have any objection or exception to the giving by the Court of these instructions or any of them?

Mr. Genzberger: No exception.

The Court: The Court refuses to give instructions numbered 1, 2, 3, 4, 5, 12, 13, 14, 15, 16 and 17 proposed by the defendant. Has the defendant any objection or exception to the action of the Court in that regard?

Mr. Dwyer: The defendant excepts to the ruling of the Court not giving instruction numbered 1 offered by the defendant and refused by the Court on the ground and for the reason that the evidence fails to show that the defendant Butte Copper and Zinc Company, was liable for any damages to the plaintiff's property, the evidence being conclusively to the effect that the damages were caused by mining conducted by a lessee and that no direct supervision of the mining was exercised by the defendant and

that no knowledge of the condition existing of the damages resulting from the mining was had by the defendant.

The Court: The objection and exception is overruled and exception is noted.

Mr. Dwyer: The defendant excepts to the refusal to give instruction number 2 offered by the defendant and refused by the Court on the ground and for the [327] reason that there is no evidence showing what caused the gas explosion, or that any act of the defendant was responsible for any of these gas explosions and that a consideration of these explosions in the present case would cause the jury to speculate on the probable cause where no evidence was given as to what the direct cause of the explosions were.

The Court: Overruled and exception will be noted.

Mr. Dwyer: The same objection and exception will be made by the defendant in regard to the Court's ruling in refusing to give instruction numbered 3.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 4 as tendered by the defendant on the ground and for the reason that it is a correct statement of the law of the case and that it is not covered by any other instruction offered in this case.

The Court: The objection will be overruled and exception will be noted. The Court intends to charge

the jury that they have a right to determine and take into consideration the interest of any witness testifying as to the outcome and the relationship to either of the parties of the action.

Mr. Dwyer: The same objection will be made to instruction numbered 5 as tendered by the Court unless the Court intends to cover that also.

The Court: Yes, that will be covered.

Mr. Dwyer: With that understanding, we have no [328] exception. The defendant excepts and objects to the refusal of the Court to give instruction numbered 12 as tendered by the defendant on the ground and for the reason that there is no evidence in this case showing any responsibility of the defendant Butte Copper and Zinc Company for the damages which are alleged to have been sustained by the plaintiff.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 13 as tendered by the defendant on the ground and for the reason that the plaintiff in this case and the theory of this case is based on the act of mining operations of the defendant, by itself or through an agent, and the evidence being conclusively to the effect that the defendant did not conduct any mining operation either by itself or through an agent, and there is a complete failure of proof in that regard in the case.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 14 tendered by the defendant on the ground and for the reason that there is no evidence which showed the nature of the plumbing repairs for which the bills in evidence were contracted; there is no evidence showing what caused the break which necessitated the repairs and damage if any of the plumbing in the plaintiff's house, the cause of this damage not being shown by the evidence and the [329] jury would have to speculate and assume that the defendant was responsible for it.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal to give instruction numbered 15 as tendered by the defendant on the ground and for the reason that it relates to an issue upon which no evidence was received in this case; it is not a proper element of damage under the complaint or the evidence in this case; there is no testimony relating to that matter and the jury would under the evidence in this case not be in an position to judge whether or not it was necessary to raze the building, or what the cost of filling the excavation would be. The instruction further assumes that the defendant would be liable for such costs even though it had nothing to do with the operations that caused the damage if any.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the re-

fusal of the Court to give instruction numbered 16 tendered by the defendant on the ground and for the reason that the law is to the effect that a lessor is not obligated to place restriction in an ordinary lease. There is no duty upon the lessor, the defendant in this case to place any such restrictions in its lease to the Anaconda Copper Mining Company, it being agreed that the lease shows that the Anaconda Copper Mining Company was required to conduct mining operations in a workmanlike [330] manner.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal to give its instruction numbered 17 on the ground and for the reason that the theory of this case and the complaint in this case alleges a value of \$500.00 on the plaintiff's property.

The Court: The objection will be overruled and exception will be noted.

The instructions that the Court has given and that were proposed by each of the parties were numbered. The Court has not changed the numbers but after the number on each instruction the Court has added the letter "P" to indicate that the plaintiff was the one that was proposing that instruction; and after the number on those proposed by the defendant the Court has added the letter "D" to indicate the instructions that were proposed by the defendant.

Now, further, gentlemen, and so that you may be advised as to the idea of the law that the Court has that is controlling in the case, the Court proposes to charge the jury as follows:

If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the [331] knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.

Does the plaintiff have any objection to the proposal of the Court in giving that instruction?

Mr. Maury: We have no objection.

The Court: Does the defendant have any objection?

Mr. Dwyer: The defendant objects to the giving

of such instructions as proposed by the Court on the ground and for the reason, one: that it assumes to make the lessor liable for the actions of the lessee, and there is no evidence of consent on the part of the lessor to the damages if any resulting from the mining.

For the further reason that the instruction takes in the period of 1917 to the date of the filing of the complaint, the evidence being that the first observable damages from mining occurred in 1943, and the original lease being terminated in 1940, and the lease under which the present operations are conducted was given in [332] the year 1940 and before any evidence of any damage occurred in the leased premises.

The Courts: The objection will be overruled and an exception will be granted.

Mr. Dwyer: Counsel called my attention to an ambiguity in my objection where I said, "The evidence showed no consent to damages." The objection should be to the effect that the defendant did not give its consent or have knowledge of any method of mining which resulted in injury.

The Court: Very well; the objection as additionally made will be overruled and exception will be noted.

(Jury returns to the court room.)

The Court: Proceed with the opening argument.

Mr. Finlen: We ask the Court at this time for an order permitting the jury a view of the Poague property.

Mr. Maury: I don't think we will object to it if it is convenient to the marshal and everybody.

The Court: Let the record show that the defendant in the action requested that the jury be permitted to view the property which is the subject of the litigation; that counsel for the plaintiff were in accord with the request, and that in the opinion of the Court it is proper for the jury to have a view of the property which is the subject of the litigation and of the places at which any material fact occurred, the Court orders that the jury be conducted in a body under the charge of the bailiff of the Court, one person representing each party, to the place which shall be shown to them by the two counsel who are present. [333]

Now, ladies and gentlemen of the jury, I am going to send you down to view these premises. You will be in charge of the bailiffs and no person other than the two counsel, one representing each side, will accompany you there, shall speak to you on any subject connected with the trial or upon any of the matters connected with the subject of the action. You, of course, may talk with each other, but no other person except the two counsel may speak to you about any matter but they may point out to you the property in litigation and all of it that you desire to see. And in that connection, ladies and gentlemen, while you are absent from the court room, I want you to bear in mind the admonition that I have given you particularly with reference to forming or expressing any opinion as to the merits of the case.

Mr. Genzberger: What is the ruling of the Court with reference to any surrounding property damaged in the neighborhood?

The Court: No, the view here will be confined to a view of the property of Mrs. Poague and any portion of the structures thereof.

Mr. Maury: May the Emma shaft be pointed out?

The Court: Yes, the Emma shaft may be pointed out to the jury.

Mr. Genzberger: And the Garfield School site?

The Court: No, the shaft is the only thing aside from the view of the premises of Mrs. Poague itself which may be pointed out to the jury in the case.

(Whereupon, the bailiffs were duly sworn by the clerk and instructed by the Court.)

(Whereupon, a recess was had until Monday, April 7, 1947, at 2:00 o'clock p.m., at which time the trial resumed with arguments of counsel for plaintiff and defendant.)

The Court: Ladies and gentlemen of the jury, I am about to give you the law of the case. Under your oath you decide any issue in a lawsuit according to the evidence you hear in the courtroom and the law given you by the Court. So you see each one of us has a part to play in the decision of any lawsuit. Your part is to determine what the facts are, what witness you believe, what witnesses you don't believe, and what weight and value you give to

evidence. That is your function, and in that function you are the sole and exclusive judges and I have nothing to do with that at all. Should I express my opinion as to what a fact might be, that opinion does not control you at all. If you think the evidence is different from my view of it, it would not only be your right but your duty to disregard it. Equally it is my function to decide what the law is. I did that from time to time during the progress of the trial. At times you will remember when legal arguments were being made to me I had you leave the courtroom because there I was about to decide a portion of my part of the case, what the law was. I [335] did that without your presence equally as when you go to your jury room to decide what the facts are I don't go there with you. So, it of necessity follows when I tell you what the law is, you accept that as true, you follow it and apply it to the facts to the best of your ability. You have no right to receive any opinion of law from anybody else except myself under your oath and if in some statement I make as to what the law is, you have some preconceived opinion that you might have of the law as told to you by somebody, it would be your duty to disregard it.

Now, this action, ladies and gentlemen, is what is known as a civil action. It is commenced because Mrs. Poague believed that the defendant, through some act violated a legal duty in injuring her property, that the defendant owed her. The action was commenced by filing the amended complaint on the 1st of April, 1946, and in that connection I desire

to charge you that the complaint is not evidence in any degree and it is not to be considered by you as evidence, neither are you to consider that any statement of fact made in the amended complaint is true, or is a fact simply because it appears in that complaint. The complaint serves the function only of succinctly and definitely in writing, stating what the plaintiff claims the defendant did that caused her detriment. That is its sole purpose, so that you and I may understand what the case is about, what charge is made, so that the defendant may likewise understand it and in the event that it contests the [336] truth of the statement of facts, the defendant may prepare to come into Court before the court and the jury and try the case. That is its only function. So you are not to consider it as evidence at all or any statement that is made therein as true simply because it appears therein.

Now, in its essentials, Mrs. Poague's complaint against the Butte Copper and Zinc Company sets out these things she says are facts, that is that since the 8th of December, 1910, she was the owner of certain real property in Butte, Montana; that she had on the real property a brick veneered dwelling consisting of six rooms and bath and central hall, and so forth, and also a brick garage. Those improved structures were hers. That since July of 1917 the defendant by itself or through its servants or partner or agent, Anaconda Copper Mining Company, has by underground mining in the Emma, Czarromah and Nellie quartz lode mining claims wrongfully destroyed and impaired the subjacent

and lateral support that her lands had and that were given to them by nature in its natural state, and that by reason of such mining the land under the buildings and improvements subsided causing damage and injury to the buildings and cracking of the walls and things of that character that are more fully set up in the complaint; that she would be required to expend \$600.00 in removing the debris as she refers to it or alleges in its essentials in the complaint. And further pleads that they are worthless. That except for the subsidence of the ground, her property would have a reasonable market [337] value on the 1st of April, 1946, the date of the commencement of the action of \$7,500.00, but that the mining with the resultant subsidence has destroyed its value and impaired it to the extent that of that \$7,500.00 there is only a salvage value of \$500.00 left, and that she has been damaged in the amount of \$7,000.00.

Now, those are her contentions as set out in her complaint. The truth of the facts are for you. The defendant had the right and did file its answer in this case, and that is its statement in writing required by law, and in that the defendant had an opportunity to admit such of the facts in the complaint that it thought to be true, if it thought any of them were true, or deny any or all of the alleged facts set out in the complaint, if the defendant thought they were untrue, and the defendant in filing its answer has denied those essential facts. Now, equally with the complaint the answer is not of any evidenciary value at all and is not to be considered

by you as such; neither is any facts set out in the answer to be taken by you as true simply because it is there. But the denials of those statements in her complaint raises what we call an issue. The plaintiff, being the plaintiff, she has the affirmative of the issue and the law says that the burden was and is on her to establish the affirmative of the issue, that is the truth of the facts that she sets out in her complaint by a preponderance of the evidence before the jury is warranted in giving her a verdict. That is the law.

Now, when you were first sworn, ladies and gentlemen, [338] there were a number of things essential that she was required to establish by a preponderance of the evidence. One of them was the truth of the fact as she alleged that there was a subsidence of the ground under her building. She was required to prove that by a preponderance of the evidence. Another was that the subsidence of the ground was caused by underground mining in the Czarromah, Emma or Nellie quartz lode. In other words, it wasn't sufficient for her to prove simply that there was a subsidence of the ground, but she was required to prove that the subsidence was caused by the underground mining in the Czarromah, Emma or Nellie quartz lode. She was equally required to prove, ladies and gentlemen, that if there was a subsidence underground that it injured or damaged her property; and she was further required to prove by a preponderance of the evidence the extent or the amount of the damage and the compensation reasonably due her for that damage. Those things

she was required to prove, and the evidence that was received in the case was pointed to prove or disprove those facts and of course it is your duty to view all the evidence and determine whether they have been proven or they have not been proven. It is your duty and your right, ladies and gentlemen, in doing that to also listen to statements of counsel, because the counsel in the case represent their client in court; they speak for their client, and in court they have a right to admit or determine what the fact is by their own admission. Attorneys have that right. And in that connection and in examining the evidence, you [339] have a right to consider the statement that Mr. Finlen, who represented the defendant, made in his argument where he said to you that there was no resistance to the fact that the property was injured by underground mining; that were he on the jury that he would feel that he would come to no other conclusion as a juror. You have a right also to consider statements made in argument to determine the fact that the property of Mrs. Poague has been damaged by that mining operation.

Now, of course, if Mrs. Poague suffered detriment as she claims she did to her property, she has a right to bring an action, for the law is that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault compensation therefor in money which is called damages. And detriment as applied to the issues in this case is loss or harm suffered in property and the measure of the damages caused by such unlawful act or omission of the other is the amount

which will compensate fully for the detriment proximately caused thereby. The term unlawful act or omission as used by me means the doing of an act by one the law forbids to be done, or the failure to do or perform an act by one that the law requires of him to do or perform.

That necessarily requires a statement from me to you, ladies and gentlemen, as to what the law is with reference to what one mining underground may lawfully do or may not lawfully do with reference to the owner of the surface of the property, if the owner of the surface of the property is one other than the [340] person who owns the minerals, as is the fact in this case. In other words, Mrs. Poague owns the surface of the property and the Butte Copper and Zinc Company owns the minerals underlying and adjacent to that property. So there is a divided ownership, and the law in that regard is in this case it has been admitted as a fact that the plaintiff Ella Poague is the owner of the property described in the amended complaint in this case and has been the owner of that property since December, 1910, and you are instructed that it is the law that said plaintiff had and has an absolute right to subjacent and lateral support for the surface of the same and for all of her structures thereon; good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave the ore unmined under, or adjacent to, or down the slope of the vein or veins in the land; it is not required that plaintiff prove that the mining methods were neg-

ligent or unskillful before she can recover; no matter how careful the method employed may have been, if the mining of the defendant underneath the surface of the Emma, Czarromah or Nellie lode claims, or any of them, did disturb the surface of Lot 4 and the north 10 feet of Lot 5 in Block 67, Butte Townsite, and injure the buildings thereon, then the defendant is liable for all the damage to said property proximately caused thereby.

You are further instructed that the plaintiff [341] Ella Poague is entitled under the facts in this case not only to subsurface but to lateral support. Subsurface or subjacent support means support from below. Lateral support is support from the sides all around the building, and if you find from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings has disturbed the plaintiff's surface, or has by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property has disturbed either the lateral support or the subjacent support of plaintiff's buildings, then the defendant is liable to the plaintiff for such disturbance because the law requires the defendant to so conduct its mining operations that the surface is at all times sustained.

Now, it appears as a fact, ladies and gentlemen, from the evidence, or at least that is my opinion that it does appear as a fact, but that is for you and for you to determine if you disagree with me, that the defendant Butte Copper and Zinc Company

did not do the actual work of mining that was done since 1917 but that was done by another, by the Anaconda Copper Mining Company and, ladies and gentlemen, it is the law if you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company has been engaged in mining on the Emma, Czarromah and Nellie quartz lode mining claims with the knowledge and consent of the [342] defendant, the Butte Copper and Zinc Company, a corporation, and as its lessee; and in the course of the mining operation so carried on by said Anaconda Copper Mining Company, a corporation, in the said mining claims did so disturb or withdraw from the surface of the property of the plaintiff the subjacent or lateral support for the said surface and as a direct and proximate result thereof, the surface of the property of the plaintiff subsided and caused injury and damage to the structure and building on the property of the plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all damage you find from the evidence the plaintiff sustained by reason of such mining operations.

Now, I have told you, ladies and gentlemen of the jury, that as to any fact in issue, before the plaintiff is entitled to a verdict at your hands, the burden is on her to prove the truth of her contention as to the facts by a preponderance of the evidence. So, as an illustration it would not be enough for her to prove or for you to believe that she suffered damage. She

must also establish the amount of the damage, because your verdict here will arrive at some kind of an amount, if you find a verdict in her favor. Now, when I say "she must prove it by a preponderance of the evidence," that simply means the greater weight of the evidence. She is not required to produce evidence establishing the truth of her contention beyond a reasonable doubt as in criminal cases. And if after viewing all the evidence introduced you feel that the evidence is evenly balanced, [343] your verdict should then be for the defendant in the case. However, if after viewing all the evidence in the case it appears to you that the evidence is weightier in any degree in establishing the truth of the material allegations of the fact in issue, then the evidence opposing the truth of such material allegations then the evidence as a whole preponderates in favor of plaintiff and she has as a matter of law established the truth of the allegations that is under attention at the time by a preponderance of the evidence.

The preponderance of evidence in this case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary if in your mind the testimony of the one witness is entitled to full credit, and in determining upon which side the preponderance of the evidence is, you should take into consideration the opportunity of the several witnesses for seeing and knowing of their own knowledge the things about which they testify, their conduct and demeanor while testifying, their interest or lack of

interest if any in the result of the case, the relationship if any between the witness and the parties to the action, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial and from all these facts and circumstances proved on the trial determine upon which side is the weight or preponderance of the evidence. [344]

Now, I have talked to you somewhat about witnesses and where there is a dispute the result depends upon the testimony of the witnesses who appeared before you. If there is a dispute as between two, it is your duty to find the fact and you must believe either the one witness or the other. That is your function. You weigh the evidence and you are the sole and exclusive judges of the effect and value of evidence. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case. Now I don't say there that the direct evidence of one witness is sufficient. I say the testimony of one witness entitled to full credit. And that means a witness who you believe and who you think and are confident is telling the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility and the weight and effect to be given his testimony. That means simply this, that when a witness is sworn here to

tell the truth and he goes on the witness stand, the law presumes and you as officers of the court must presume that that witness is going to tell the truth, but you don't know whether as a matter of fact he actually tells the truth or not until you hear his testimony. But you must do more than hear it. He is before you and you must use the faculty of your eyesight to [345] determine this situation. You judge his credibility not only from what he says but the manner in which he speaks it and from not only the words that he says but the way he says it; does he impress you, or she impress you that he or she is telling the truth. You cannot determine that unless you both hear and see the witness. Now, while you are the sole and exclusive judges of the effect and value of the evidence, your power of judging of the effect of evidence is not arbitrary. In other words, you are controlled in your decision by rules of law the same as I am in my part of the decision and to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds; and a witness false in one part of his testimony is to be distrusted in others. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and therefor if weaker and less satisfactory evidence is offered when it

appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. You have no right to disregard the testimony of a witness where his testimony has not been contradicted and where the witness giving it has not been impeached by any of the ways I pointed out to you a witness may be impeached. Wherever during the trial of [346] this case a fact is admitted to be true in open court by attorneys representing the plaintiff or defendant in this case, no evidence, or less evidence is required, as the admission proves its truth and you are bound to find the evidence in the case to be true upon such admission.

Now, ladies and gentlemen, if your verdict is to be for the plaintiff in this case, as to the way you determine detriment and the resultant damage she is entitled to, if you find she is entitled to any, and in that case you are instructed that the cost of reconstructing the building is not the market value of the building, but is only one of the elements to be considered in determining what is the market value of the building, and you must also take into consideration the amount of depreciation in the value of that building resulting from deterioration due to age and use. The measure of damages for injury to plaintiff's property is the difference between the market value of the property immediately before the injury and the market value of the property immediately after the injury. Evidence presented in court for the purpose of showing the cost of repairing or rebuilding the plaintiff's house and garage does not

of itself prove or establish the market value of said buildings either before or after they sustained damages, but as I charged you, it is one of the elements that may be taken into consideration. Now, by market value is meant the price that the premises in question would bring when offered for sale by one desiring but not compelled to sell, and bought by one desiring but not compelled to purchase. It is known in law [347] as a transaction between a willing seller and a willing buyer and where there is no compulsion exercised at all on the one hand to sell and the other hand to buy.

You are instructed that you have no right to trust your own opinion in this case, unsupported by proof. The testimony of the witnesses and the instructions of the court are your sole guide and you are bound by them. If you find for the plaintiff, then, in estimating the damage, the jury are to consider the market value of the premises before the happening of said injuries as compared with the present market value of said premises in so far as you find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's prayer in the amended complaint herein, and allow to the plaintiff such damages as will compensate her for such injuries to her property. In other words, ladies and gentlemen, if you find she is entitled to recover, then it is your function to place her as nearly whole as you can, to give her sufficient money to compensate her for whatever loss you find that she has suffered. That is your function, simply com-

pensation. You are not to give her more than you feel she has suffered. She is not to be rewarded, but it is just to determine as nearly as you can under the evidence and within the limits of the instructions exactly the monetary loss she has been caused, if you find she has been caused any and repay her for that monetary loss.

Evidence of damage to other property in the vicinity of plaintiff's property as described in the amended complaint herein, which was permitted to be introduced in this case, does not of itself prove damages to plaintiff's property but, if you find such damage to have occurred due to mining operations on the part of the defendant and that such damages to other property as a direct consequence, has affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property may be by you taken into consideration in fixing the fair market value of plaintiff's property, and the amount of damages if any, to the plaintiff. You are instructed that if you find your verdict for the plaintiff, you may assess such damages as will fairly compensate plaintiff for her loss by reason of the acts of the defendant as shown by the evidence in this case. However, in no event can you assess the damages in excess of \$7,000.00. And the reason for that is, ladies and gentlemen, that that is all she claims in her pleadings—she was damaged and you could not give her more even though you may feel her damages were more. You are instructed that if you find your verdict in favor of the plaintiff Nellie Poague, then

it is within your discretion to allow her interest at six per cent per annum from the date this suit was commenced upon such amount, if you do find for her the damage she suffered. The law does not require you to do that; it is entirely within your province whether you think she should receive interest or not. If you think she should, you may give it to her at the rate of six per cent per annum and if you think she should not, if you think the sum you have set [349] out in your verdict in dollars and cents compensate her, you can refuse to give interest on that sum.

Now, ladies and gentlemen, it requires a unanimous verdict to return a verdict in this case; twelve of you must agree on a verdict, all of you; your action must be unanimous. When you retire to your jury room, you are to select one of your number as foreman. That foreman will sign any verdict you agree on. As soon as you have all agreed on a verdict, you will notify the bailiff and you will then be brought into the courtroom to return your verdict whatever it may be. The case is not as yet submitted to you. There are some matters we must now undertake that would be better done outside of your presence and if you retire into the hall a moment and hold yourself in readiness to return at the call of the court.

(Jury leaves courtroom.)

The Court: Has the plaintiff any exceptions or objections to that portion of the charge given by the court to the jury that was not excepted to this morning?

Mr. Maury: We have no exception.

The Court: Has the defendant any exception or objection to that portion of the charge of the court just given to the jury that the defendant did not except or object to this morning?

Mr. Finlen: If the Court please, the defendant objects and excepts to that portion of the Court's charge which in effect informs the jury that the matter alleged in the complaint, evidence pled is not and can not be weighed as evidence, upon the ground and for the reason that the defendant asserts that admissions [350] contained in a complaint or pleading are judicial admissions and may be considered as elements.

The Court: There is no question but what that is correct, Mr. Finlen, but you did not correctly get my charge to the jury. I said matters in the complaint was not evidence, neither were they accepted as true, any facts set out in the complaint simply because it was a statement of fact and before there could be an admission there had to be two pleadings. In other words, in one pleading there is something stated as a fact. I told the jury because it was stated there does not make it a fact; but if in another pleading that is admitted, then it does become a fact and it is because of the admission set out in the second pleading.

Mr. Finlen: What I had in mind is the allegation in the complain that the property at the time of the filing of the complaint was of the value of \$500.00. The defendant states that the jury may consider the plaintiff bound by that allegation.

The Court: Well, your objection will be overruled. Is there anything further?

(Jury returns to courtroom.)

The Court: Now, ladies and gentlemen of the jury, the case is finally submitted to you. You will retire to your jury room to consider of your verdict in company with the bailiff. Forms of verdict will be submitted to you by the clerk and you will take them with you. When you have finally arrived at a unanimous verdict, you may inform the bailiffs and they will inform me and you will then be brought into the courtroom. You may [351] retire.

(The jury retires from the courtroom in charge of sworn bailiffs.)

The following are the Instructions tendered by the Plaintiff and refused by the court:

[Title of Court and Cause.]

PLAINTIFF'S REQUEST FOR INSTRUCTIONS

Comes now the plaintiff in the above entitled action, Nellie Allen Poague, formerly Nellie Allen, and hereby respectfully requests the Court to give the jury the following instructions numbered 1 to 10, inclusive.

E. N. GENZBERGER,

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff.

Instruction No. 1

You are instructed that in determining upon which side the weight or preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or knowing of their own personal knowledge the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent [352] consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances provided on the trial, and from all of these circumstances proved on the trial, and from all of these circumstances determine upon which side is the weight or preponderance of the evidence.

Instruction No. 4

You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff's property has been damaged through mining activities of the defendant in the so-called Emma Mine as alleged in the Amended Complaint herein, then you are instructed to find your verdict in favor of the plaintiff and against the defendant.

Instruction No. 6

You are instructed that when the surface of land is owned by one, and the mineral beneath, with the

right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. In either case the obligation to protect the surface is the same.

Catron v. South Butte Mining Co. (CCA 9th),
181 Fed. 941.

Instruction No. 7

I charge you that where there are wrongful acts of continued existence upon premises that are leased, the landlord and owner may be liable for damages resulting [353] therefrom, and the landlord is liable if he permits the tenant to do such acts and executes a lease without any demand or provision therein that the tenant refrain from doing such wrongful acts. Here it is proven that when Butte Copper and Zinc Company executed a lease to Anaconda Copper Mining Company to work the land for joint benefit of both, there was no reservation of any kind in the lease, or provision that Anaconda Company should protect the surface of plaintiff's ground, and in such condition, if the acts of the Anaconda Company, lessee, were unlawful and wrongful, then the Butte Copper and Zinc Company, lessor, is liable for the same.

Instruction No. 8

You are instructed that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault

a compensation therefor in money, which is called damages, and in this connection, you are further instructed that detriment is a loss of harm and suffered in property.

Instruction No. 10-P

If you find the issues in this case in favor of the plaintiff and against the defendant, it then becomes your duty to assess plaintiff's damages in such sum as you may find from the evidence will reasonably compensate her for the detriment sustained by her, and as defined in these instructions in no case to exceed the sum of Seven Thousand and no/100 (\$7,000.00) Dollars, the amount prayed for in the Amended Complaint in this action. [354]

The following are the Instructions tendered by the Defendant and refused by the court:

[Title of Court and Cause.]

DEFENDANT'S REQUEST FOR INSTRUCTIONS

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 1 to 8, inclusive.

W. H. HOOVER,

R. H. GLOVER,

JOHN V. DWYER,

J. T. FINLEN, JR., and

SAM STEPHENSON, JR.,

Attorneys for Defendant.

Instruction No. 1

You are instructed that the Lessor of the property, in this case the Butte Copper and Zinc Company, Defendant, is not liable for the damages to the plaintiff's property due to the mining operations of a Lessee.

Instruction No. 2

You are instructed that you must disregard all evidence which was presented to you in this trial regarding gas explosions, and that you must not consider any such evidence in arriving at your verdict in this case.

Instruction No. 3

You are instructed that you must disregard all evidence which was presented to you in this trial regarding repairs to leaks in gas pipes or repairs or [355] changes made in the same, and that you must not consider any such evidence in arriving at your verdict in this case.

Instruction No. 4

Anyone who is in any way financially interested in the outcome of the controversy is an interested witness, and with reference to the testimony of interested witnesses the law says that such testimony is not to be disbelieved, but that it is to be weighed more closely and scrutinized more carefully by the jury than the testimony of disinterested witnesses.

Instruction No. 5

You are instructed that the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or his or her motives or by contradictory evidence. The jury is the exclusive judge of his or her credibility. However, a witness false in one part of his or her testimony is to be distrusted in others.

The following are the Instructions tendered by the Defendant and refused by the court:

[Title of Court and Cause.]

DEFENDANT'S REQUEST FOR
INSTRUCTIONS

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 9 to 13, inclusive.

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR., and
SAM STEPHENSON, JR.,
Attorneys for Defendant.

Instruction No. 12

You are instructed to return your verdict in favor of the defendant, Butte Copper and Zinc Company, a corporation.

Instruction No. 13

You are instructed that there is no evidence in this case that the mining operations alleged to have damaged the plaintiff's property were carried on by Butte Copper and Zinc Company, either by itself or through a servant agent or partner.

The following are the Instruction tendered by the Defendant and refused by the court:

[Title of Court and Cause.]

DEFENDANT'S REQUEST FOR
INSTRUCTIONS

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 14 to 17, inclusive.

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR., and
SAM STEPHENSON, JR.,
Attorneys for Defendant.

Instruction No. 14

You are instructed that you must disregard all evidence which was presented to you in the trial of this case regarding plumbing bills alleged to have been paid by the plaintiff, and you must not consider such evidence in arriving at your verdict in this case.

Instruction No. 15

You are instructed that you must disregard all evidence regarding the cost of razing the buildings on plaintiff's property and the filling of excavations thereon, and you must not consider any such evidence in arriving at your verdict in this case.

Instruction No. 16

You are hereby instructed that the fact that the lease between the Butte Copper and Zinc Company, defendant in this case, and the Anaconda Copper Mining Company contains no specific provision to the effect that the Lessee must maintain the surface of the demised ground has no bearing on the issue in this case and must therefore be disregarded.

Instruction No. 17

You are instructed that the admission contained in plaintiff's complaint that the property has a value of Five Hundred Dollars is binding upon the plaintiff, and you must therefore find that plaintiff's property has a value of not less than Five Hundred Dollars.

The following are the Instructions tendered by the Plaintiff and the Defendant and given by the Court:

Instruction No. 2-P

In this case it has been admitted as a fact that the plaintiff, Ella Poague, is the owner of the property described in the Amended Complaint in this case and has been the owner of that property since December, 1910, and you are instructed that it is the law that said plaintiff had and has an absolute right to subjacent and lateral support for the surface of the same and for all of her structures thereon; good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave the ore unmined under, or adjacent to, or down the slope of the vein or veins in the land; it is not required that plaintiff prove that the mining methods were negligent or unskillful before she can recover; no matter how careful the method employed may have been, if the mining of the defendant underneath the surface of the Emma, Czarromah or Nellie Lode Claims, or any of them, did disturb the surface of Lot 4 and the North 10 feet of Lot 5 in Block 67, Butte Townsite, and injure the buildings thereon, then the defendant is liable for all the damage to [359] said property proximately caused thereby.

Instruction No. 3-P

You Are Instructed that the plaintiff, Ella Poague, is entitled under the facts in this case, not only to sub-surface but to lateral support. Sub-surface or subjacent support means support from below. Lateral support is support from the sides all around the building, and if you find from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings, has disturbed the plaintiff's surface, or has by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property has disturbed either the lateral support or the subjacent support of plaintiff's buildings, then the defendant is liable to the plaintiff for such disturbance because the law requires the defendant to so conduct its mining operations that the surface is at all times sustained.

Instruction No. 6-D

You are instructed that the cost of reconstructing the building is not the market value of the building, but is only one of the elements to be considered in determining what is the market value of the building, and you must also take into consideration the amount of depreciation in the value of that building resulting from deterioration due to age and use. [360]

Instruction No. 8-D

You are instructed that the measure of damages for injury to plaintiff's property is the difference between the market value of the property immediately before the injury and the market value of the property immediately after the injury.

Instruction No. 9-D

You are instructed that the evidence presented in Court for the purpose of showing the cost of repairing or rebuilding the plaintiff's house and garage does not of itself prove or establish the market value of said buildings either before or after they sustained damages.

Instruction No. 10-D

You are instructed that by "market value" is meant the price that the premises in question would bring when offered for sale by one desiring but not compelled to sell, and bought by one desiring but not compelled to purchase.

Instruction No. 11-D

You are instructed that you have no right to trust your own opinion in this case, unsupported by proof. The testimony of the witnesses and the instructions of the Court are your sole guide and you are bound by them.

Instruction No. 9-P

The Court instructs the jury that, if you find

for the plaintiff, then, in estimating the damage, the jury are to consider the market value of the premises before [361] the happening of said injuries as compared with the present market value of said premises in so far as you find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's prayer in the Amended Complaint herein, and allow to the plaintiff such damages as will compensate her for such injuries to her property.

4 Randall's Instructions to Juries, Sec. 3861
p. 4201.

Instruction No. 5-P

The jury is instructed that the evidence of damage to other property in the vicinity of plaintiff's property as described in the amended complaint herein, which was permitted to be introduced in this case, does not of itself prove damages to plaintiff's property, but, if you find such damage to have occurred due to mining operations on the part of the defendant and that such damages to other property as a direct consequence, has affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property may be by you taken into consideration in fixing the fair market value of plaintiff's property, and the amount of damages, if any, to the plaintiff.

Instruction No. 7-D

You are instructed that if you find your verdict for the plaintiff you may assess such damages as

will fairly compensate plaintiff for her loss by reason of the acts of the defendant as shown by the evidence in [363] this case. However, in no event can you assess the damages in excess of Seven Thousand Dollars (\$7,000.00).

Instruction No. 11-P

The jury are instructed that if you find your verdict in favor of the plaintiff, Nellie Poague, then it is within your discretion to allow her interest at 6 per cent. per annum from the date this suit was commenced.

That thereafter the jury retired to consider of their verdict and subsequently, to-wit: On April 7, 1947, returned into court their verdict in favor of the plaintiff and against the defendant, which said verdict is as follows, to-wit:

[Title of Court and Cause.]

VERDICT

We, the jury of the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff's damages in the sum of Fifty Five Hundred Dollars with interest. (\$5500.00) Dollars, with interest thereon at the rate of six per cent. per annum (6%) from February 2, 1946.

HARRY HIGH,

Foreman. [364]

PLAINTIFF'S EXHIBIT No. 8-A

is as follows, to-wit:

This indenture, made and entered into as of 6th day of July, A. D. 1917, by and between the Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine (hereinafter called the "Zinc Company"), party of the first part, and the Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana (hereinafter called the "Mining Company"), party of the second part,

Witnesseth:

First: That, in consideration of the rentals and royalties to be paid as hereinafter provided, and of the mutual agreements hereinafter contained, the Zinc Company hereby leases and demises unto the said Mining Company the following described property, situated in the County of Silver Bow, State of Montana, particularly described as follows, to-wit:

The Emma quartz lode mining claim, Lot No. 131, Survey No. 728; together with lots 1, 2, 3, 4, 5, 6, 16, 17 and 18, in block 59, and all other lots owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim, Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned

Plaintiff's Exhibit No. 8-A—(Continued)

by John P. Reins and J. Maude D. Ayers, of Butte, Montana, in and to the Ella Quartz lode mining claim, Lot No. 139, being all interest referred to, described [365] and covered by that certain lease and option, executed on September 8, 1916, by John P. Reins and J. Maud D. Ayers to F. J. Lyons, the said lease and option, having been assigned to the Zinc Company, and the said Zinc Company now proceeding to acquire title to the said interest in said Ella lode claim under and by virtue of said lease and option.

The Nellie quartz lode mining claim, Lot No. 136, and lots 1 to 10 inclusive, in block 5, of the Nellie Addition to the City of Butte.

Also all other real property and interest, situated in said County of Silver Bow, and which lies adjacent to or in the immediate vicinity of any of the property above leased, and which the Zinc Company may acquire during the term of this lease, it being understood and agreed that if the Zinc Company shall, during the life of this lease, acquire any other real property or interests lying adjacent to or in the immediate vicinity of any of the above leased property, the said property so purchased shall, during the remainder of the leased term, be subject to and covered by the terms of this lease, and be leased and let hereby to the same effect as if fully described herein.

Also all veins, lodes, ledges and ore bodies and rights of every character and description, lying within or belonging to the above leased premises, or any part thereof.

Plaintiff's Exhibit No. 8-A—(Continued)

There is excepted herefrom all surface lots and rights heretofore conveyed by the grantors of the Zinc Company, and which are not now owned or possessed [366] by the Zinc Company herein.

This lease shall be and continue in force and effect, unless sooner terminated by forfeiture or abandonment, for the period from the execution hereof, until and including the 8th day of July, 1931.

Second: It is agreed that the said Mining Company shall have the right, during the said leased term, to work all of the said premises above described and referred to, in mine fashion, and to extract and remove therefrom all ores and minerals which may be encountered, and which, in the Mining Company's opinion, may be desirable or profitable to extract and remove.

The said Mining Company agrees that it will, during the said leased term, continue in possession of said leased premises and the mine workings therein contained, and that it will install and provide such suitable equipment and machinery as may be necessary in order to operate the same.

The said Mining Company further agrees to prosecute with reasonable diligence the mining operations contemplated hereunder, and to that end binds itself to employ underground not less than ten men working each twenty shifts per month during the said leased term. All work done by the Mining Company on said property shall be done in a good, workmanlike, minerlike and substantial manner.

Plaintiff's Exhibit No. 8-A—(Continued)

Third: The said Mining Company further agrees that on or before the 8th day of July, 1925, it will sink the shaft now on the said Emma lode claim an additional vertical distance so that the same shall, on or before [367] said date, reach a depth of eight hundred feet below what is known as the 800-foot level in said mine, or the said Mining Company shall extend southerly from such mine workings as shall be determined by it, a crosscut to be driven through the vertical plane of the north side line of said Emma claim, and to extend in a general southerly direction through said Emma claim, and beyond its south side line, to an intersection with that certain vein known and described as the Emma vein, said crosscut to be driven at a level which will cause it to crosscut the said Emma vein at the same approximate level that the crosscut southerly from said Emma shaft, at a depth of approximately eight hundred feet below the present so-called 800-foot level of said Emma shaft, would so crosscut the said Emma vein; and that the said Mining Company will drift on said Emma vein at least four hundred feet laterally from the said intersection. If, in the judgment of the Mining Company, the developments on the said level where the said crosscut shall intersect the said vein, justify the opening up of said level and the extraction of ores therefrom beyond the doing of development and prospect work, it is agreed that the Mining Company will sink the said Emma shaft, or such other shaft, as may be agreed upon between the parties hereto to

Plaintiff's Exhibit No. 8-A—(Continued)

a sufficient depth to open up a level and connect the same with the crosscut or mine workings established by the said intersection at said level.

It is understood and agreed that any and all work, shaft sinking or crosscutting heretofore done by the Mining Company shall be considered, so far as the same [368] is applicable, part of the work herein provided for.

Fourth: The said Mining Company shall be entitled to retain and keep, for its own use and benefit, fifty per cent of the net returns from all ores and minerals mined hereunder, and shall account for and pay to the Zinc Company the remaining fifty per cent of the said returns, the said Mining Company to account to the Zinc Company for the said fifty per cent to be paid to the Zinc Company, within fifteen days after receiving settlement from the smelter or reduction works for the ores and minerals shipped.

In arriving at the net returns for the purpose of division, as herein provided, between the Zinc Company and the Mining Company, respectively, all costs and charges of maintaining, preserving, protecting the said property, including all taxes upon the property leased, all costs and charges of mining, milling, smelting, reduction, development, transportation and other charges, of every kind whatsoever, incurred in connection with the maintenance, operation and mining of the said premises, and the transportation and reduction of the ores obtained therefrom, and the selling of the metals returned or

Plaintiff's Exhibit No. 8-A—(Continued)

disposed of, shall be deducted, to reach the net returns to be divided between the parties as herein set forth; provided that any crosscut which may be driven from other properties of the Mining Company to develop said premises shall not be considered development work for the purpose of deducting the cost thereof, until such crosscut or crosscuts shall have passed through the vertical plane of the north side line of [369] the Emma or Czarromah lode claims.

Fifth: It is understood and agreed that the management of the property hereby leased, and the conduct of all mining operations thereon, shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; also, that the Mining Company shall have the exclusive right to arrange for, enter into and make such contract as it may see fit, for the milling and reduction of any and all ores extracted from the said premises, and the marketing and disposing of the metals obtained therefrom; provided the said Mining Company will use due diligence to make as favorable contracts in this connection as it may be able to obtain in the general course of the trade.

Sixth: At any time when the Mining Company possesses milling, smelting or other reduction works, capable of and suitable for treating the character of ores which may be obtained from the leased premises, and undertaking to treat and reduce such ores so obtained, it is agreed that the said Mining Company will make a contract with

Plaintiff's Exhibit No. 8-A—(Continued)

the Zinc Company for the treatment of such ores upon as favorable terms as are made by the said Mining Company for the treatment of similar ores of like grade and quantity, treated for any other custom producer. A contract for smelting and reduction of such ores for five years of the period covered by this lease has been executed contemporaneously with the execution hereof.

Seventh: All money necessary for the operations herein provided for, including taxes, shall be advanced by the Mining Company, but the Zinc Company shall have [370] no authority to incur any expense, nor will the said Mining Company, nor the said operations be liable therefor, unless the same has first been agreed to by the said Mining Company, and no salaries or other expenses of the Zinc Company shall be charged in any way against the said Mining Company or the said operations to be conducted under this lease.

Eighth: It is further understood and agreed that the said Mining Company may at any time abandon and terminate this lease and cease working and operating the property covered hereby, by giving six months' notice in writing to the said Zinc Company of its intention so to do, and during the said period of six months after giving of such notice, the said Mining Company shall keep the mine workings in said property free from water, and upon the termination of said six months period, and upon the turning over of the possession of said property by the said Mining Company to the said Zinc Company, all obligations and liability on the

Plaintiff's Exhibit No. 8-A—(Continued)
part of the Mining Company, of any kind or character hereunder, will cease and terminate, and this lease shall be at an end.

It is further understood and agreed that in the event that the said Mining Company be by an act of God, fire, flood, water, strike, lockouts or other causes beyond its control, prevented from fulfilling any condition or term of this lease, such failure shall not be considered a breach of the terms hereof, but the said Mining Company agrees, in any such case, to use all reasonable diligence to remove such preventing [371] cause.

Ninth: It is further understood and agreed that upon the expiration of this lease, either by lapse of time, abandonment or forfeiture, the said Mining Company will return the peaceful possession of said leased premises to the said Zinc Company, with all openings and workings thereon, necessary for the continued operation of said property, in good condition for such further operation, and that all machinery and equipment which shall have been permanently installed or attached to the mine property or workings shall become the property of the Zinc Company. In determining the property and equipment which shall pass to the Mining Company, it is understood that the same shall not include tools, supplies and equipment which shall not have been affixed to the realty.

Tenth: It is further understood and agreed that the Mining Company shall keep proper books and records showing the mining operations conducted under this lease and the proceeds therefrom, and

Plaintiff's Exhibit No. 8-A—(Continued)

that the Zinc Company shall have the right, through its duly designated officers, representatives or agents, to examine all accounts of the Mining Company, kept in connection with the performance of work hereunder, and the making of settlements therefor, and that the said Zinc Company, its officers, representatives or agents, shall at all reasonable times have access to and egress from all of the premises of the Zinc Company, in the control of the Mining Company hereunder, together with the right to make full inspection and survey of the same and to [372] obtain at reasonable periods from the Mining Company copies of working maps, showing the mining operations conducted in the said property.

The said Mining Company, except as hereinafter expressly excepted, hereby assumes all claims which may arise in favor of any individual, firm or corporation for any tort or contract obligation arising out of the operation of the leased premises during such period as they shall be in possession of the Mining Company, or incurred while controlling the same, and the Mining Company will indemnify and keep indemnified the said Zinc Company, its successors and assigns, against any and all such claims, and at its own cost and expense defend such claims and pay any cost or judgment recovered thereon; provided, however, that the said Mining Company shall not be under any obligation or duty, or incur any liability whatsoever in connection with any claim which may be asserted by any person or corporation, of ownership to any of the premises

Plaintiff's Exhibit No. 8-A—(Continued)

hereby leased, or any ores or minerals mined or removed therefrom, or for trespass upon any of the premises hereby leased; this lease being entered into upon the understanding and basis that the Zinc Company is the owner of the premises and ore bodies hereinabove described and referred to, and shall be deemed, from the date hereof to supersede the lease of July 8, 1915.

This lease shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns. [373]

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers, thereunto duly authorized, the day and year above written.

[Seal] BUTTE COPPER & ZINC
COMPANY,

By /s/ ALBERT J. SILIGMAN,
Its President.

Attest:

/s/ A. L. BAILEY,
Its Secretary.

[Seal] ANACONDA COPPER
MINING COMPANY,

By /s/ B. B. THAYER,
Its Vice-President.

Attest:

/s/ A. H. MELIN,
Its Secretary.

Plaintiff's Exhibit No. 8-A—(Continued)

State of New York,
County of New York—ss.

On this 21st day of August, A. D. 1917, before me, M. E. Bryans, a notary public in and for the County and State of New York, personally appeared Albert J. Seligman, to me known and known to me to be the President of the Butte Copper & Zinc Company, the corporation that executed the within agreement, and acknowledged to me that such corporation executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written. [374]

[Seal] M. E. BRYANS,
Notary Public in and for New York County and
State. (No. 273.)

My commission expires March 30, 1919.

State of New York,
County of New York—ss.

On this 21st day of August, A. D. 1917, before me, M. E. Bryans, a notary public in and for the County and State of New York, personally appeared B. B. Thayer, to me known and known to me to be the Vice-President of the Anaconda Copper Mining Company, the corporation that executed the within agreement, and acknowledged to me that such corporation executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal] M. E. BRYANS,

Notary Public in and for New York County and State. (No. 273.)

My commission expires March 30, 1919.

Filed April 7, 1947. H. H. Walker, Clerk. [375]

PLAINTIFF'S EXHIBIT No. 9

is as follows, to-wit:

This indenture, made and entered into as of this 17th day of October, A. D. 1927, by and between the Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine (hereinafter called the "Zinc Company"), party of the first part, and the Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana (hereinafter called the "Mining Company"), party of the second part,

Witnesseth:

Whereas, under date of July 6, 1917, the Zinc Company as lessor, duly entered into a lease with the Mining Company, as lessee, whereby the Zinc Company leased and demised to the Mining Com-

Plaintiff's Exhibit No. 9—(Continued)

pany the following described property situated in the County of Silver Bow, State of Montana, to wit:

The Emma quartz lode mining claim, Lot No. 131, Survey No. 728; together with lots 1, 2, 3, 4 5, 6, 16, 17 and 18, in block 59, and all other lots owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim, Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned by John P. Reins and J. Maude D. Ayers, of Butte, Montana, in and to the Ella Quartzlode mining claim, Lot No. 139, being all interest referred to, described and covered by that certain lease and option executed on [376] September 8, 1916, by John P. Reins and J. Maude D. Ayers to F. J. Lyons, the said lease and option having been assigned to the Zinc Company, and the said Zinc Company having acquired title to the said interest in said Ella Lode claim under and by virtue of said lease and option.

The Nellie quartz lode mining claim, Lot No. 136, and lots 1 to 10 inclusive, in block 5, of the Nellie Addition to the City of Butte.

Also all other real property and interest, situated in said County of Silver Bow, and which lies adjacent to or in the immediate vicinity of any of the property above described, and which the Zinc Com-

Plaintiff's Exhibit No. 9—(Continued)

pany has acquired or may acquire during the term of said lease.

Also all veins, lodes, ledges and ore bodies and rights of every character and description, lying within or belonging to the above leased premises, or any part thereof; and

Whereas, during the term of said lease, the Zinc Company has acquired the Mary Louise quartz lode mining claim, Lot No. 159, Survey No. 807, the Railroad quartz lode mining claim, Lot No. 330, Survey No. 1201, and the Ophir quartz lode mining claim, Lot No. 220, Survey No. 968, in said County of Silver Bow, State of Montana, which claims are now subject to the terms of said lease.

Whereas, the parties hereto desire to extend the term of said lease from the 8th day of July, 1931, to and including the 8th day of July, 1936, upon the same rentals and royalties and subject to the same conditions as provided in said lease: [377]

Now, Therefore, in consideration of the premises and of the rentals and royalties to be paid as provided in said lease and of the mutual agreements therein contained and of the sum of One Dollar paid by the Mining Company to the Zinc Company, receipt of which is hereby acknowledged, and of other valuable considerations, the Zinc Company hereby modifies the said lease so that the term thereof shall continue until and including the 8th day of July, 1936, unless sooner terminated by for-

Plaintiff's Exhibit No. 9—(Continued)

feiture or abandonment, such modification to have the same effect as though the said lease as originally executed had so provided.

It is understood and agreed that if the Zinc Company shall during the life of said lease as herein modified, acquire any other real property or interests lying adjacent to or in the immediate vicinity of any of the property leased pursuant to the terms of said lease, as herein modified, the said property so purchased and all veins, lodes, ledges and ore bodies and rights of every character and description lying within or belonging to the said property or any part thereof shall, during the remainder of the leased term, as herein modified, be subject to and covered by the terms of said lease, as herein modified, and be leased and let to the same effect as if fully described in said lease.

Except as herein specifically modified, the said lease and all of the terms, provisions and conditions thereof shall continue in full force and effect and shall be applicable to the expiration of the extended term. Nothing in this agreement shall modify the provisions [378] of the agreement between the parties hereto, dated July 6, 1917, as modified by the parties hereto, respecting the method of accounting for ores mined from the leased properties.

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers,

Plaintiff's Exhibit No. 9—(Continued)
thereunto duly authorized, the day and year above
written.

BUTTE COPPER & ZINC
COMPANY,

By /s/ ALBERT J. SELIGMAN,
Its President.

[Seal] /s/ A. L. BAILEY,
Its Secretary.

ANACONDA COPPER
MINING COMPANY,

/s/ B. B. THAYER
Its Vice-President.

Attest:

[Seal] /s/ A. H. MELIN,
Its Secretary.

Filed April 7, 1947. H. H. Walker, Clerk. [379]

PLAINTIFF'S EXHIBIT No. 10

is as follows, to-wit:

This Indenture made and entered into as of the
1st day of June, A. D., 1933, by and between Butte
Copper & Zinc Company, a corporation organized
under the laws of the State of Maine, (hereinafter
called the "Zinc Company"), party of the first
part, and Anaconda Copper Mining Company, a
corporation organized under the laws of the State
of Montana (hereinafter called the "Mining Com-
pany"), party of the second part,

Plaintiff's Exhibit No. 10—(Continued)

WITNESSETH:

Whereas, under date of July 6, 1917, the Zinc Company as lessor duly entered into a lease with the Mining Company as lessee, whereby the Zinc Company leased and demised to the Mining Company the following described property, situated in the County of Silver Bow, State of Montana, to-wit:

The Emma quartz lode mining claim, Lot No. 131, Survey No. 728; together with lots 1, 2, 3, 4, 5, 6, 16, 17 and 18, in block 59, and all other lots owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim, Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned by John P. Reins and J. Maude D. Ayers, of Butte, Montana, in and to the Ella quartz lode mining claim, Lot No. 139, being all interest referred to, described and covered by that certain lease and option executed [380] on September 8, 1916, by John P. Reins and J. Maude D. Ayers to F. J. Lyons, the said lease and option having been assigned to the Zinc Company, and the said Zinc Company having acquired title to the said interest in said Ella lode claim under and by virtue of said lease and option.

The Nellie quartz lode mining claim, Lot No. 136, and Lots 1 to 10, inclusive, in block 5, of the Nellie Addition to the City of Butte.

Plaintiff's Exhibit No. 10—(Continued)

Also all other real property and interest, situated in said County of Silver Bow, and which lies adjacent to or in the immediate vicinity of any of the property above described, and which the Zinc Company has acquired or may acquire during the term of said lease.

Also the veins, lodes, ledges and ore bodies and rights of every character and description, lying within or belonging to the above leased premises, or any part thereof; and

There were excepted from the property leased all surface lots and rights conveyed by the grantors of the Zinc Company prior to the date of the lease and which at that date were not owned or possessed by the Zinc Company.

Whereas, during the term of said lease the Zinc Company has acquired the Mary Louise quartz lode mining claim, Lot No. 159, Survey No. 807, the Railroad quartz lode mining claim, Lot No. 330, Survey No. 1201, and the Ophir quartz lode mining claim, Lot No. 220, Survey No. 968, in said County of Silver Bow, State of Montana, which claims are now subject to the terms of said lease; [381] and

Whereas, the parties hereto by indenture dated as of the 17th day of October, A.D., 1927, extended the term of said lease from the 8th day of July, 1931, to and including the 8th day of July, 1936, and by agreement dated the 7th day of June, 1932, agreed to a temporary suspension of operation of said properties; and

Plaintiff's Exhibit No. 10—(Continued)

Whereas, the parties hereto hereby desire to modify the provisions of said lease as extended and to further extend the term thereof;

Now, Therefore, in consideration of the premises, and of the mutual covenants herein contained, and of the rentals and royalties to be paid as provided in said lease as heretofore and herein modified, and of the sum of One Dollar (\$1) paid by the Mining Company to the Zinc Company, receipt of which is hereby acknowledged, and of other valuable considerations, the parties hereto do hereby agree as follows:

1. The said agreement between the parties hereto dated the 7th day of June, 1932, shall be terminated as of the 1st day of June, 1933, provided that the Mining Company shall be entitled to deduct, as hereinafter provided in paragraph 4, all amounts expended pursuant to said agreement, as well as any and all amounts expended or to be expended under said lease and this agreement, in arriving at the net returns of any future operations and making the division provided in Article Fourth of said lease.

2. The Mining Company agrees to expend over the three months' period beginning June 1, 1933, and ending August 31, 1933, approximately the sum of Forty-five [382] Thousand Dollars (\$45,000) in the aggregate for (a) repairs to levels, stopes and working places in the mines covered by said lease, (b) reconditioning the mining machinery and equipment, and (c) for all other purposes required by

Plaintiff's Exhibit No. 10—(Continued)

said lease, including all expenditures made during the month of June, 1933, by the Mining Company under the above-mentioned agreement dated the 7th day of June, 1932. The Mining Company shall deliver to the Zinc Company on July 15, 1933, August 15, 1933, and September 15, 1933, a certified statement showing its expenditures under this paragraph 2.

3. The parties hereto hereby modify and amend the said lease so that the term thereof shall continue until and including the 8th day of July, 1941, unless sooner terminated in accordance with the specific provisions for termination contained in said lease, such modification to have the same effect as though the said lease as originally executed had provided for a term expiring on the 8th day of July, 1941.

4. Before making any division of the net returns of any future operation under said lease or paying an ypart thereof to the Zinc Company, as provided in Article Fourth of said lease, the Mining Company shall be entitled to and shall deduct from such net returns

(a) All amounts heretofore expended by the Mining Company under the terms of said agreement dated the 7th day of June, 1932;

(b) All expenditures heretofore made under said lease and which have not been heretofore deducted from said returns and which by the terms of said lease the Mining Company is entitled to deduct before making any division of said returns;

Plaintiff's Exhibit No. 10—(Continued)

(c) All expenditures hereafter made by the Mining Company under said lease and which by the terms thereof the Mining Company is entitled to deduct before making any division of said returns; and

(d) All expenditures made or to be made under the terms of paragraph 2 hereof; it being understood that the Mining Company shall be entitled to make such deductions regardless of the period of time required to provide net returns sufficient to equal such deductions, and that until the net returns of future operations have been sufficient to provide not only for the items referred to in said Article Fourth, but for the foregoing items as well, the Zinc Company shall not be entitled to any part of the net returns of such operations.

5. It is understood and agreed that if the Zinc Company shall during the life of said lease as herein modified acquire any other real property or interests lying adjacent to or in the immediate vicinity of any of the property leased pursuant to the terms of said lease, as herein modified, the said property so purchased and all veins, lodes, ledges and ore bodies and rights of every character and description lying within or belonging to the said property or any part thereof shall, during the remainder of the leased term, as herein modified, be subject to and covered by the terms of [384] said lease, as herein modified, and be leased and let to the same effect as if fully described in said lease.

Plaintiff's Exhibit No. 10—(Continued)

6. Except as herein specifically modified, the said lease and all of the terms, provisions and conditions thereof shall continue in full force and effect and shall be applicable to the expiration of the extended term. Nothing in this agreement shall modify the provisions of the agreement between the parties hereto dated July 6, 1917, as modified by the parties hereto, respecting the method of accounting for ores mined from the leased properties, such agreement to continue until terminated by either party in accordance with its terms.

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers thereunto duly authorized the day and year above written.

BUTTE COPPER & ZINC
COMPANY,

By A. J. SELIGMAN,
President.

Attest:

C. C. NICHOLS,
Asst. Secretary.

[Seal]

ANACONDA COPPER MINING
COMPANY,

By J. R. HOBBS,
Vice President.

Attest:

D. B. HENNESSY,
Secretary.

[Corporate Seal]

Plaintiff's Exhibit No. 10—(Continued)

State of New York,
County of New York—ss.

On this 15th day of August, 1933, before me personally came Albert J. Seligman, to me known, who, being by me duly sworn, did depose and say that he resides in New York, N. Y.; that he is the President of Butte Copper & Zinc Company, one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal]

W. G. MARTIN,

Notary Public, Nassau County

Certificate filed in N. Y. County County Clerk's
No. 2, Reg. No. 4M1.

My commission expires March 30, 1934.

State of New York,
County of New York—ss.

On this 15th day of August, 1933, before me personally came J. R. Hobbins, to me known, who, being by me duly sworn, did depose and say that he resides in Butte, Montana; that he is the Vice President of Anaconda Copper Mining Company, one of the corporations described in and which executed the foregoing instrument; that he knows

Plaintiff's Exhibit No. 10—(Continued)

the corporate seal of said corporation; that the seal affixed to said instrument is such corporate [386] seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal]

M. E. BRYANS,

Notary Public, Queens County
No. 222.

Certificate filed in N. Y. County County Clerk's
No. 136, Reg. No. 4B64.

My commission expires March 30, 1934.

Filed April 7, 1947. H. H. Walker, Clerk. [387]

PLAINTIFF'S EXHIBIT No. 11

is as follows, to-wit:

This Indenture, made this 24th day of June, 1940, by and between Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine, (hereinafter called the "Zinc Company"), party of the first part, and Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana, (hereinafter called the "Mining Company"), party of the second part, Witnesseth:

That, Whereas, under date of July 6, 1917, the Zinc Company, as lessor, entered into a lease with the Mining Company, as lessee, whereby the Zinc

Plaintiff's Exhibit No. 11—(Continued)

Company leased and demised to the Mining Company the properties therein described, which are hereinafter described, for a term expiring the 8th day of July, 1931; and

Whereas, thereafter by agreement dated the 17th day of October, 1927, the term of said lease was extended to and including the 8th day of July, 1936, under the same general terms and conditions as provided in said original lease; and

Whereas, thereafter by agreement dated June 1, 1933, the parties hereto modified said lease in certain particulars, and extended the term thereof to the 8th day of July, 1941, and said lease as modified by the subsequent agreements is now in full force and effect; and

Whereas, the parties hereto desire to modify the provisions of said lease and to extend the term thereof, and to incorporate in a new lease document the various changes and modifications which have been made in said lease, and to make other changes and modifications related [388] to the present condition of the property and the continued operation thereof, and to execute a new agreement superseding all previous agreements relating to the subject matter, and to cancel said lease of July 6, 1917, for the remaining term thereof to the end that this agreement be effective contemporaneously with the cancellation thereof;

Now, Therefore, in consideration of the rents to be paid, and covenants performed, and the mutual agreements as herein provided, the Zinc Company

Plaintiff's Exhibit No. 11—(Continued)

does hereby lease, let and demise unto the Mining Company the following described property, situated in the County of Silver Bow, State of Montana, particularly described as follows:

The Emma Quartz Lode Mining Claim (Patented), Lot No. 131, Survey No. 728;

The Czarromah Quartz Lode Mining Claim (Patented), No. 129, Survey No. 720;

The Travonia Fraction Quartz Lode Mining Claim (Patented), Lot No. 149, Survey No. 791;

The Nellie Quartz Lode Mining Claim (Patented), Lot No. 136, Survey No. 759;

The Mary Louise Quartz Lode Mining Claim (Patented), Lot No. 159, Survey No. 807;

The Railroad Quartz Lode Mining Claim (Patented), Lot No. 330, Survey No. 1201;

The Ophir Quartz Lode Mining Claim (Patented), Lot No. 220, Survey No. 968;

The Manhattan Quartz Lode Mining Claim (Patented), Survey No. 2647;

The Single Tax Quartz Lode Mining Claim (Patented), Lot No. 587, Survey No. 2681; [389]

Forty-two sixty-fourths ($42/64$ ths) interest, and all other right, title and interest of the Zinc Company in and to the Ella Quartz Lode Mining Claim (Patented), Lot No. 139, Survey No. 770;

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347; described as follows:

Beginning at the S. W. corner of the tract herein described which is also the S. E. Cor. No. 5 of Sur.

Plaintiff's Exhibit No. 11—(Continued)

No. 664, Black Placer, and running thence North 693 feet to the N. E. corner No. 4 of Sur. No. 664, Black Placer; thence East 3 feet more or less along the boundary of the Butte Townsite to the east side of Wyoming street; thence S. $5^{\circ} 30'$ E., along the east side of Wyoming street, projected southerly from the Butte Townsite, 133 feet, more or less, to the S. W. Cor. of the Barnard Lot; thence N. 82° E., 168 feet along the South Boundary of the Barnard Lot to the West side of Arizona street, projected southerly from the Butte Townsite; thence North along the west side of Arizona street, projected southerly from the Butte Townsite, 110 feet to the boundary of Butte Townsite; thence east along the boundary of the Butte Townsite 60 feet to the west boundary of Survey No. 783; Hesperus Lode; thence south 323 feet along the west boundary of Survey No. 783, Hesperus Lode, to the west boundary of Arizona street; thence N. $22^{\circ} 15'$ W., along the west side of Arizona street, projected northerly from the Hopkins Addition to the northeast corner of the Mary McBride Lot; thence S. $67^{\circ} 45'$ W., 100 feet to the N.W. cor. of the Mary McBride Lot; thence S. $22^{\circ} 15'$ E., 93.5 feet along the east side of alley to the north boundary of Sur. No. 807, Mary Louis Lode; thence N. $75^{\circ} 50'$ W., along the north boundary of Sur. No. 807, Mary Louise Lode, 18 feet, more or less, to the west side of alley; then N. $22^{\circ} 05'$ W., 109.5 feet along the west side of alley; thence N. $0^{\circ} 05'$ W., 46.5 feet along west side of alley; thence west 58.5 feet along

Plaintiff's Exhibit No. 11—(Continued)

north boundary of Provo Lot to the east side of Wyoming street, projected southerly from Butte Townsite; thence S. $4^{\circ} 03'$ E., 45 feet to the southwest corner of Provo Lot; thence East 54.5 feet to the S.E. cor. of the Provo Lot; thence S. $86^{\circ} 0'$ W., 54.5 feet to the N.W. Cor. of Thomas R. Hinds Lot; thence S. $4^{\circ} 03'$ E., 75.3 feet more or less to the north boundary of Sur. No. 807, Mary Louise Lode, projected westerly; thence S. $75^{\circ} 50'$ E., 5 feet, more or less, to the N.W. Cor. No. 2 of Sur. No. 807, Mary Louise Lode; thence S. $3^{\circ} 45'$ E., along the west boundary of Sur. No. 807, Mary Louise Lode, 376.5 feet to the south boundary of Sur. No. 664, Black Placer projected easterly; thence west along the south boundary of Sur. No. 664, Black Placer, projected easterly, 61.5 feet to the place of beginning.

Excepting from the foregoing the following described tract: Beginning at the S.E. Cor. of the tract herein described, from which the S.E. Cor. of Butte Townsite on the west boundary of Sur. No. 783, Hesperus Lode, bears N. $14^{\circ} 57'$ E., 210 feet and running thence S. $67^{\circ} 48'$ W., 100 feet; thence N. $0^{\circ} 15'$ W., 47 feet; thence N. $67^{\circ} 45'$ E., 100 feet; thence S. $0^{\circ} 15'$ E., 47 feet to the place of beginning.

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347, described as follows:

Beginning at the N.W. Cor. of the tract herein described, a point on the S. boundary of Sur. No. 664, Black Placer, from which the S.W. Cor. No. 6

Plaintiff's Exhibit No. 11—(Continued)

of said Sur. No. 664, Black Placer, bears west 50 feet, and running thence along the S. boundary of said Sur. No. 664, Black Placer, 100 feet; thence south 35 feet; thence N. $83^{\circ} 0' W.$, 100 feet; thence north 24 feet to the place of beginning.

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347, described as follows:

Beginning at the N.W. Cor. of the tract herein described, which is also the S.W. Cor. No. 6 of Sur. No. 664, Black Placer, and running thence east along the south boundary of said Sur. No. 664, Black Placer, 50 feet; thence south 24 feet; thence S. $83^{\circ} 0' E.$, 100 feet; thence north 35 feet to a point in south boundary of Sur. No. 664, Black Placer; thence east 211.5 feet, more or less, to a point on the west boundary of Sur. No. 807, Mary Louise Lode; thence S. $3^{\circ} 45' E.$, along the west boundary of Sur. No. 807, Mary Louise Lode, 113 feet, more or less, to a point on the north boundary of Sur. No. 1201, Railroad Lode; thence N. $89^{\circ} 40' W.$, along the north boundary of Sur. No. 1201, Railroad Lode, 73.5 feet, more or less, to the N.W. Cor. No. 4 of said Sur. No. 1201, Railroad Lode; thence S. $1^{\circ} 0' W.$, along the west boundary of said Sur. No. 1201, Railroad Lode, 90.5 feet, more or less to a point on the north boundary of Sur. No. 759, Nellie Lode, thence N. $83^{\circ} 0' W.$, along the north boundary of said Sur. No. 759, Nellie Lode, 297.5 feet, more or less, to a point on the east boundary of the Butte Townsite; thence North along the east boundary of

Plaintiff's Exhibit No. 11—(Continued)
the Butte Townsite, 165.5 feet, more or less, to the place of beginning.

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347, described as follows:

Beginning at the S.E. Cor. of Lot 1 in Block 56 of Butte Townsite, and running thence south along the west side of Arizona street 114.4 feet; thence S. $82^{\circ} 0' W.$, 168 feet to the east line of Wyoming street; thence north along the east line of Wyoming street, 123.6 feet to the S.W. Cor. of Lot 2 in Block 56 of Butte Townsite; thence east along the south side line of Lots 2 and 1 in said Block 56, 172 feet to the place of beginning.

The Black Placer Quartz Lode Mining Claim (Patented), Lot No. 110, Survey No. 664, in Section 13, Township 3 North, Range 8 West;

The Bob Ingersoll Quartz Lode Mining Claim (Unpatented), as described in notice of location thereof recorded in the office of the County Clerk and Recorder of Deer Lodge County, in Book "L" of Lodes, at page 607, and in the office of the County Clerk and Recorder of Silver Bow County, Montana, in Book "B" of Lodes at page 732 of Transcribed records;

The Montana Central Quartz Lode Mining Claim (Unpatented), as described in the Notice of Location thereof recorded in Book "K" of Lodes, at page 729 of the records of the office of the County Clerk and Recorder of Deer Lodge County, Montana, and in Book 6 of Lodes at page 252 in the

Plaintiff's Exhibit No. 11—(Continued)

Transcribed records of the office of the County Clerk and Recorder of Silver Bow County, Montana;

All that portion of the surface of the Mary Louise Lode Mining Claim (Patented), Survey No. 807, Lot 159, in the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Three (3) North, Range Eight (8) West, and Lot 81, in the Southwest Quarter ($SW\frac{1}{4}$), Section Eighteen (18), Township Three (3) North, Range Seven (7) West, Silver Bow County, Montana, described as follows:

Beginning at the Northeast Corner of the tract herein described, from which the Northwest Corner of Lot 1, Block 3, of the Hopkins Addition to the City of Butte, Montana, bears N. $68^{\circ} 02' E.$, 16 ft. and running thence S. $68^{\circ} 02' W.$ 70.85 ft.; thence S. $84^{\circ} 19' W.$ 0.96 ft.; thence S. $5^{\circ} 41' E.$ 94.03 ft.; thence N. $68^{\circ} 02' E.$ 98.71 ft.; thence N. $22^{\circ} 15' W.$ 90.0 ft. to the place of beginning, containing an area of 0.18 acres, more or less, subject to an easement for Park purposes to School District No. 1, to the portion of this above-described tract west of a line parallel to the east boundary and 60 ft. west from said line.

All that portion of the surface of the Ophir Quartz Lode Mining Claim (Patented), Lot No. 220, Survey No. 968, described as follows:

Beginning at a point on the south line of said Ophir Lode Mining Claim, from which point corner No. 4, the Southwest Corner of said Ophir Lode Claim, bears N. $71^{\circ} 30' W.$, 358.8 feet and running

Plaintiff's Exhibit No. 11—(Continued)

thence north 195.8 feet; thence east 512 feet; thence south 300 feet; thence west 199.3 feet; thence N. 71° 30' W., 329.9 feet; to the place of beginning. Containing 3.18 acres, more or less.

Excepting, however, that portion which lies south of the Butte, Anaconda & Pacific Railroad track, which railroad track crosses said Ophir Lode Claim in an easterly and westerly direction.

Lot 14, and an undivided one-half interest in Lots 15 and 16, in Block 57, and Lots 1, 2, 3, 4, 5, 6, 14, 15, 16, 17 and 18 in Block 59 of the Original Townsite of Butte, according to the official plat and survey thereof on file and of record in the office of the County Clerk and Recorder of Silver Bow County; Montana; [395]

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in Block 5 of the Nellie Addition to the Townsite of Butte, according to the official plat and survey thereof on file and of record in the office of the County Clerk and Recorder of Silver Bow County, Montana;

All minerals, and the right to remove the same, in and under Lots 1 and 2 in Block 56 of the Original Townsite of Butte, according to the official plat and survey thereof on file and of record in the office of the County Clerk and Recorder of Silver Bow County, Montana.

Also, all other real property, property rights, and interests in property situated in the County of Silver Bow, State of Montana, lying adjacent to or in the immediate vicinity of any of the property above-described, and which the Zinc Company owns

Plaintiff's Exhibit No. 11—(Continued)

or has acquired, or may acquire during the term of this lease; also all veins, lodē, ledges and ore bodies and rights of every character and description lying within or belonging to the above leased premises or any part or parcel thereof.

Excepting, however, from the property leased hereby, all surface lots and rights heretofore conveyed by grantors of the Zinc Company prior to the date hereof and at that date not owned or possessed by Zinc Company.

It Is Understood And Agreed, that if the Zinc Company shall, during the life of this lease, acquire any other real property or interests in property lying adjacent to or in the immediate vicinity of any of the above-described property, that the property or property rights [396] so acquired shall, during the remainder of this lease term, be subject to and covered by the terms of this lease, and be leased and let hereby to the same effect as if fully described herein.

First: This lease shall become effective upon the date hereof, and shall continue in force and effect unless sooner terminated by forfeiture or abandonment for the period of ten (10) years from said date, until and including the 24th day of June, 1950. Upon the date of this instrument and simultaneously with the effective date hereof, the said lease dated the 6th day of July, 1917, and all amendments and modifications thereof shall be and are hereby cancelled and annulled. It is understood that such cancellation shall not affect any rights or obliga-

Plaintiff's Exhibit No. 11—(Continued)

tions which may have accrued under said lease dated the 6th day of July, 1917, and said amendments and modifications thereof, prior to the date of such cancellation.

Second: It is agreed that the Mining Company shall have the right, during the term hereof, to work all of the said premises above-described and referred to in mine fashion, and extract and remove therefrom all ores and minerals which may be encountered and which in the Mining Company's opinion it may be desirable or profitable to extract and remove. The Mining Company agrees that it will, during the term hereof, continue in possession of said leased premises and the mine workings therein contained, and that it will maintain and provide such suitable equipment and machinery as may be necessary to operate the same. The Mining Company further agrees to prosecute with reasonable diligence mining operations in [397] and upon said properties or parts thereof, and to that end binds itself to employ underground not less than ten men working each twenty (20) shifts per month during the term hereof. All work done by the Mining Company in said property shall be done in a good, workmanlike, minerlike, and substantial manner.

Third: Before making any division of the net returns of the operation of the property under this lease, or paying any part thereof to the Zinc Company as hereinafter provided, the Mining Company shall be entitled to and shall deduct from such re-

Plaintiff's Exhibit No. 11—(Continued)

turns all amounts now remaining undeducted and unpaid which the Mining Company has been and is entitled to deduct under the terms and provisions of the agreement of June 1, 1933, between the parties hereto, and the letter agreement between the parties hereto of December 10, 1934, and the said original lease of July 6, 1917, between the parties hereto, and by and all amendments and modifications thereof.

That the amount to be deducted by the Mining Company, as herein provided, has been audited and agreed to as the sum of Three Hundred Fifty-seven Thousand Six Hundred Fifty-six and 77/100 Dollars (\$357,656.77) as of January 1, 1940, and it is understood and agreed that the Mining Company shall be entitled to deduct said amount as adjusted to the date hereof from the net returns of any future operation under this lease before making any division of the net returns as hereinafter provided, or paying any part thereof to the Zinc Company, and shall be entitled to deduct said amount, regardless of the period of time required to provide net returns sufficient to equal such [398] deduction, and that until the net returns of future operations, as hereinafter defined, have been sufficient to provide said amount, the Zinc Company shall not be entitled to any part of the net returns of the operation of the property.

The Mining Company shall be entitled to retain and keep for its own use and benefit fifty per cent. (50%) of the net returns from all ores and minerals

Plaintiff's Exhibit No. 11—(Continued)

mined hereunder, and shall account for and pay to the Zinc Company the remaining fifty per cent. (50%) of said net returns. The Mining Company shall account to the Zinc Company for said fifty per cent. (50%), to be paid to the Zinc Company within fifteen (15) days after receiving settlement from the smelter or reduction works for the ores and minerals shipped. In arriving at the net returns for the purpose of division as herein provided between the Zinc Company and the Mining Company, respectively, all costs and charges of maintaining, preserving and protecting the said property, including all taxes upon the property leased, all costs and charges of mining, milling, smelting, reduction, development, transportation and other charges of every kind whatsoever incurred in connection with the maintenance, operation and mining of the said properties, and the transportation and reduction of the ores obtained therefrom, and the selling of the metals returned or disposed of shall be deducted to reach the net returns to be divided between the parties as herein set forth; provided, that any cross-cut which may be driven from other properties of the Mining Company to develop said premises shall not be considered development [399] work in deducting mining costs until such crosscut or cross-cuts shall have passed through the vertical plane of the north side line of the Emma or Czarromah lode claims.

Fourth: It is understood and agreed that the management of the property hereby leased and the

Plaintiff's Exhibit No. 11—(Continued)

conduct of all mining operations thereon shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; also that the Mining Company shall have the exclusive right to arrange for, enter into and make such contract as it may see fit for the milling and reduction of any and all ores extracted from said premises and the marketing and disposing of the metals obtained therefrom; provided, that the Mining Company will use due diligence to make as favorable contracts in this connection as it may be able to obtain in the general course of the trade.

Fifth: At any time when the Mining Company possesses milling, smelting or other reduction works capable of and suitable for treating the character of ores which may be obtained from the leased premises and undertakes to treat and reduce such ores so obtained, it is agreed that the Mining Company will make a contract with the Zinc Company for the treatment of such ores upon as favorable terms as are made by the Mining Company for the treatment of similar ores of like grade and quantity, treated for any other custom producer. A contract for the smelting and reduction of zinc ores from the said property has been in effect between the parties hereto, as modified from time to time, since the execution of the original lease of July 6, 1917, and it is agreed that a contract [400] for the smelting and reduction of zinc ores for the period covered by this lease has been executed contemporaneously

Plaintiff's Exhibit No. 11—(Continued)
with the execution hereof, and is hereto attached,
marked Exhibit "A."

It is understood by the parties hereto that, in addition to the zinc ores in said property, there have been extracted from time to time, and there are now being extracted and marketed, certain high-grade manganese ores; and further, that prior hereto, as evidenced by the agreement between these parties dated the 17th day of May, 1920, an attempt was made to develop the business of making ferro-manganese and thus utilizing low-grade rhodochrosite or carbonate of manganese ores present and to some extent developed in said properties, and further that it was found that the business of making ferro-manganese could not be conducted profitably, and the operation of the said agreement of May 17, 1920 was discontinued, and that said agreement has been and is hereby cancelled and annulled.

It is further understood and agreed that the Mining Company has been experimenting with and perfecting a process at its metallurgical plants for the concentration and reduction of the low-grade manganese ores in said properties, and has developed such process to the point that it seems feasible from an operating standpoint to concentrate and reduce said manganese ores, and to produce a merchantable produce of nodulized manganese ore thereby, and further that the market for such product may be such in the near future or

Plaintiff's Exhibit No. 11—(Continued)

during the term of this lease as to justify the extraction and treatment of the said [401] manganese ores from said mine, but the success of the operation of mining, treating and selling said manganese ores is at present uncertain.

It is understood and agreed that at any time when the Mining Company possesses milling, concentrating or reduction works capable of and suitable for treating the said manganese ores, or any manganese ores which may be obtained from the leased premises, and undertakes to mine, treat, concentrate or reduce such ores so obtained, the Mining Company and the Zinc Company will make, but the Zinc Company shall not be required to make, a contract for the treatment of such ores upon reasonable and fair terms, to be agreed upon between the parties, having due regard to the payment to the Mining Company of the cost of the investment in plant and equipment for the treatment, concentration or reduction of said ores, as well as the operating cost of that operation.

Sixth: All money necessary for the operations herein provided for, including taxes, shall be advanced by the Mining Company, but the Zinc Company shall have no authority to incur any expense, nor will the said Mining Company nor the said operations be liable therefor, unless the same has first been agreed to by the Mining Company, and no salary or other expenses of the Zinc Company shall be charged in any way against the said Mining

Plaintiff's Exhibit No. 11—(Continued)

Company, or the said operations to be conducted under this lease.

Seventh: It is further understood and agreed that the said Mining Company may at any time abandon and terminate this lease and cease working and operating the property covered hereby by giving six (6) months' notice in [402] writing to the said Zinc Company of its intention so to do, and during the said period of six (6) months after the giving of such notice, the Mining Company shall keep the mine workings in said property free from water and upon the termination of said six (6) months' period, and upon the turning over of the possession of said property by the Mining Company to the Zinc Company, all obligations and liabilities on the part of the Mining Company, of any kind or character hereunder, shall cease and terminate, and this lease shall be at an end.

Eighth: It is further understood and agreed that if, because of any Act of God, fire, flood, water, strike, lock-out, or without limitation by the foregoing, any other cause or causes beyond its control, the Mining Company shall be prevented from fulfilling any term or condition of this lease, such failure shall not be considered a breach of the terms hereof, and the Mining Company shall not be liable in any manner on account thereof, but the Mining Company agrees in any such case to use all reasonable diligence to remove such preventing cause.

Ninth: It is further understood and agreed that

Plaintiff's Exhibit No. 11—(Continued)

upon the termination of this lease, either by lapse of time, abandonment, or forfeiture, the Mining Company will return the peaceful possession of said leased premises to the Zinc Company with all openings and workings thereon necessary for the continued operation of said property in good condition for such further operation, and that all machinery and equipment which shall have been permanently installed or attached to the realty or mine [403] properties or workings, together with one-half ($\frac{1}{2}$) of the tools, supplies and equipment which shall not have been affixed to the realty, shall become the property of the Zinc Company.

Tenth: It is further understood and agreed that the Mining Company shall keep proper books and records showing the mining operations conducted under this lease, and the proceeds therefrom, and that the Zinc Company shall have the right, through its duly designated officers, representatives, or agents, to examine all accounts of the Mining Company kept in connection with the performance of the work hereunder, and the making of settlements for the ores and products of the property, and that the Zinc Company, its officers, representatives or agents, shall at all reasonable times have access to and egress from all of the premises of the Zinc Company in the control of the Mining Company hereunder, together with a right to make full inspection and survey of the same, and to obtain at reasonable periods from the Mining Company copies

Plaintiff's Exhibit No. 11—(Continued)
of working maps showing mining operations conducted in said properties.

Except as hereinafter provided, the Mining Company assumes as between the parties hereto the responsibility for all claims which may arise in favor of any individual, firm or corporation for any tort arising out of the operation of the leased premises during the period that such premises are in possession of the Mining Company, or any contract obligations incurred by the Mining Company while controlling said premises, and the Mining Company agrees to indemnify and keep indemnified the Zinc Company, its [404] successors and assigns, against any and all such claims, and at its own cost and expense to defend against such claims and pay the cost of such defense, and any judgment recovered on such claims; provided, however, that the Mining Company shall not be under any obligation or duty, nor shall it have any liability whatsoever in connection with any claim which may be asserted by any person or corporation of ownership to any of the premises leased hereby, or any ores, or minerals in ore, mined or removed therefrom, or for trespass upon any of the premises above described, this lease being entered into upon the understanding and the basis that the Zinc Company is the owner of the premises and the ore bodies hereinabove described and referred to.

Eleventh: This lease is and shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

Plaintiff's Exhibit No. 11—(Continued)

In Witness Whereof, the parties have caused these presents to be executed, and their corporate seals affixed, by their respective officers thereunto duly authorized, the day and year first above written.

[C. S.] BUTTE COPPER AND ZINC
COMPANY,

By /s/ ALPHONSE A. SHELARE,
Its President.

Attest.

/s/ MILES S. McDONALD,
Its Secretary.

[C. S.] ANACONDA COPPER
MINING COMPANY,

By /s/ J. R. HOBBS,
President.

Attest:

/s/ K. B. FRAZER,
Its Ass't Secretary. [405]

State of New York,
County of New York—ss.

On this 5th day of July, A. D. 1940, before me, Edward Perpeet Jr., a Notary Public in and for said county and state, personally appeared Alphonse A. Shelare, known to me to be the President of the Butte Copper & Zinc Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written. (N. S.)

(N. S.) /s/ EDWARD PERPEET JR.

Notary Public for the State of New York, Residing
at 190 Woodland Ave., White Plains, N. Y.
My Commission expires 1941.

EDWARD PERPEET JR.

Notary Public Westchester Co. Certificate Filed in
N. Y. Co. No. 569, New York Register's No.
1-P-340. Commission expires March 30, 1941.

State of New York,
County of New York—ss.

On this 8th day of July, A. D. 1940, before me, Walter G. Martin, a Notary Public in and for the said county and state, personally appeared J. R. Hobbins, known to me to be president of Anaconda Copper Mining Company, the corporation that executed the within instrument, and acknowledge to me that such corporation [406] executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written.

(N. S.) /s/ WALTER G. MARTIN,

Notary Public for the State of..... Residing
at..... My Commission expires.....
Notary Public, Nassau County No. 1057. Certificate Filed in N. Y. County. County Clerk's No. 38, Reg. No. 2-M-14. My Commission expires March 30, 1942.

Filed: April 7, 1947. H. H. Walker, Clerk.

CERTIFICATE

I, Joseph V. Flaherty, hereby certify that I am a stenographic court reporter by profession and occupation; that on March 31, 1947, the Honorable R. Lewis Brown, Judge of the District Court of the United States for the District of Montana, Butte Division, made an order of record appointing me official court reporter for the trial of Cause No. 176, Poague versus Butte Copper and Zinc Company; that I reported in shorthand the testimony of the witnesses and the proceedings of the court during the trial of said cause, and that the above and foregoing is a true and correct transcription of such testimony and proceedings to the best of my skill and ability.

/s/ JOSEPH V. FLAHERTY.

Filed May 2, 1947. H. H. Walker, Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 422 pages, numbered consecutively from 1 to 422, inclusive, is a full, true and correct transcript of

all matter designated by the parties and required by rule as the record on appeal in case No. 176, Mrs. Nellie Allen Poague, Plaintiff, vs. Butte Copper and Zinc Company, a corporation, Defendant, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that pursuant to the order of said District Court, I transmit herewith as a part of the record on appeal, original plaintiff's Exhibits 1, 12, 13, 14, 15, 17, 18, 19, 20-a, 20-b, 21, 22, 23, 24, 25, 26 and 27 and defendant's Exhibits 4 and 28, all of which said exhibits were received in evidence at the trial of said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-Nine and 30/100 Dollars (\$39.30), and have been paid by the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 13th day of May, A.D. 1947.

[Seal]

H. H. WALKER,
Clerk.

/s/ By D. F. HOLLAND,
Deputy Clerk. [422]

[Endorsed]: No. 11633. United States Circuit Court of Appeals for the Ninth Circuit. Butte Copper and Zinc Company, a corporation, Appellant, vs. Mrs. Nellie Allen Poague, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 20, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11633

BUTTE COPPER AND ZINC COMPANY, a cor-
poration,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE, formerly
NELLIE ALLEN,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL, SUBDIVISION 6 OF
RULE 19 (C.C.A.)

STATEMENT OF POINTS ON APPEAL

Appellant and defendant, Butte Copper and Zinc
Company, a corporation, hereby specifies the follow-
ing points upon which it intends to rely on the
appeal in the above entitled matter:

I.

The Court committed error in refusing to grant defendant-appellant's motion for a directed verdict (tr. p. 323) because:

1. There was and is no evidence to support a verdict in favor of plaintiff-appellee and against the defendant-appellant.

2. There was and is no evidence to support a judgment in favor of plaintiff-appellee and against defendant-appellant.

3. There was and is no evidence that defendant-appellant performed any act or acts that could or did cause any damage to plaintiff-appellee's property.

4. The evidence was and is conclusive that defendant-appellant did not perform any act or acts that could or did cause any damage to plaintiff-appellee's property.

5. There was and is no evidence that defendant-appellant performed any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff-appellee's property.

6. The evidence was and is conclusive that the defendant-appellant did not perform any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff-appellee's property.

7. The evidence was and is conclusive that defendant-appellant was a Lessor of the prop-

erty in which the mining alleged to have damaged the property of the plaintiff-appellee was performed; and that any mining performed was performed by a Lessee and was not under the control or supervision of defendant-appellant.

II.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 2 (tr. pp. 327-328; 355) for each of the reasons set forth in Paragraph I above.

III.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 3 (tr. pp. 327-328; 355-356) for each of the reasons set forth in Paragraph I above.

IV.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 5 (tr. pp. 325, 356) because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

V.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 9 (tr. pp. 325; 361-363) because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

VI.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 11 (tr. pp. 326, 364) because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

VII.

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 1

(tr. pp. 327-355) for each of the reasons set forth in Paragraph I above.

VIII.

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 12 (tr. pp. 328-329; 357) for each of the reasons set forth in Paragraph I above.

IX.

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 13 (tr. pp. 329, 357) for each of the reasons set forth in Paragraph I above.

X.

That the Court committed error in giving that portion of its charge to the jury set forth as follows:

“If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarro-mah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or

withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.” (tr. pp. 331-333; 342-343).

for each of the reasons set forth in Paragraph I above.

XI.

That the Court committed error in admitting the evidence of leaks, repairs or changes in gas mains or pipes (tr. pp. 82-94) and evidence of gas explosions (tr. pp. 207-209) over defendant-appellant’s objections, and in refusing to grant defendant-appellant’s motion to strike such evidence (tr. pp. 306-310) because:

1. There was and is no evidence that proved or tended to prove that said leaks, repairs or changes or gas explosions were due to or caused by any act or acts of defendant-appellant, its agent, servant or partner.

2. There was and is no evidence tending to show or prove that any such leaks, repairs or changes in gas lines or pipes or gas explosions were competent, relevant or material, or that they tended to prove or disprove any issue in

this case or that plaintiff-appellee sustained any damages thereby.

3. No cause was ascribed for the leaks, repairs or changes or explosions and no evidence was or is given upon which a conclusion as to the causes of such leaks or explosions could properly be predicated, and that the jury was permitted to speculate as to the reasons for and causes of said leaks, repairs or changes in gas lines and pipes and the reasons for or causes of said gas explosions.

XII.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 2 (tr. pp. 327-328; 355) for each of the reasons set forth in Paragraph XI above.

XIII.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 3 (tr. pp. 328; 355-356) for each of the reasons set forth in Paragraph XI above.

XIV.

That the Court committed error in refusing defendant's-appellant's motion to strike the testimony of plaintiff-appellee Poague respecting leaks in the plumbing of her house (tr. pp. 306-310) and in refusing to grant defendant-appellant's requested Instruction numbered 14 (tr. pp. 329-330; 358) because:

1. There was and is no evidence that said leaks were caused by ground movement due to mining.

2. There was and is no evidence tending to show or prove that facts regarding any such leaks were competent, relevant or material or that they tended to prove or disprove any issue in this case.

3. No cause was ascribed for the leaks and no evidence was or is given upon which a conclusion as to the cause of such leaks could be properly predicated.

XV.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 15 (tr. pp. 330, 358) because:

1. For each of the reasons set forth in Paragraph I above.

2. There was and is no evidence that the razing of the buildings was necessary.

3. The evidence conclusively shows that the razing of plaintiff-appellee's buildings was not necessary to protect pedestrians using the sidewalks as alleged in the complaint.

4. The allegation of the complaint that razing of the buildings was necessary to protect pedestrians on the sidewalks in front of said buildings and that the cost thereof was a necessary element of damages was wholly unsupported by the evidence and should not have been left for the consideration of the jury.

XVI.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 16 (tr. pp. 330-331; 358) because:

1. The law does not make a Lessor of mining ground liable for damage because of failure to include a covenant or agreement in its lease to the effect that the Lessee will support the surface of the ground.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant, Butte Copper and Zinc Company, a corporation, hereby designates under Subdivision 6 of Rule 19 (C.C.A.) the following portions of the certified typewritten Transcript of Record in the above entitled cause on file herein to be contained in the printed record on the appeal of said appellant:

1. Title of Court and Cause (tr. p. 1).
2. Names and addresses of attorneys of record (tr. p. 2).
3. Plaintiff's Amended Complaint (tr. pp. 4-8).
4. Answer of Butte Copper and Zinc Company, defendant (tr. pp. 10-13).
5. Minute Entry denying and overruling the First Defense in defendant's Answer (tr. p. 15).
6. Reporter's Transcript of testimony (tr. pp. 27-408).

7. That portion of the Minute Entry dated April 3, 1947, contained in Paragraph 7 thereof, setting forth the Order denying defendant's motion for a directed verdict (tr. p. 17).

8. Verdict (tr. p. 19).

9. Judgment (tr. pp. 21, 22).

10. Notice of Appeal (tr. p. 24).

11. Order for Transmission of Original Exhibits (tr. p. 410).

12. Order Amending Order for Transmission of Original Exhibits (tr. p. 410-B).

13. Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely (tr. pp. 412-418).

14. Certificate of Clerk of Court (tr. p. 422).

15. Statement of Points Upon Which Defendant Intends to Rely and Designation of Portions of the Record to be Printed Under Rule 19 (C.C.A.).

Dated this 15th day of May, 1947.

/s/ W. H. HOOVER,

/s/ R. H. GLOVER,

/s/ JOHN V. DWYER,

/s/ J. T. FINLEN, JR.,

/s/ SAM STEPHENSON, JR.,

Attorneys for Defendant and
Appellant.

Service of the foregoing Statement of Points on Appeal and Designation of Contents of Record on Appeal, Subdivision 6 of Rule 19 (C.C.A.) acknowledged, and copy thereof received, this 15th day of May, 1947.

/s/ EARL N. GENZBERGER,

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed May 20, 1947.



